What Do Nonunions Do?
What Should We Do About Them?

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Table of Contents

Foreword

The Task Force on Reconstructing America's Labor Market Institutions

The world of work is changing, but the traditional structures governing the labor market, in place since the New Deal, no longer serve the needs of workers and their families or of corporations seeking to compete in a global economy.

The mandate of the Task Force on Reconstructing America's Labor Market Institutions is to provide a body of evidence that helps policymakers and practitioners structure a national discussion on how to update the nation's labor market institutions—resolving the mismatch between a fundamentally new economy and a set of inappropriate intermediaries, laws, and corporate practices.

The efforts of Task Force members are divided among three working groups, each charged with examining a particular aspect of this labor market mismatch: the Working Group on the Social Contract and the American Corporation, the Working Group on Low-Income Labor Markets, and the Working Group on America's Next Generation Labor Market Institutions.

"Symposium on Changing Employment Relations and New Institutions of Representation," Task Force and U.S. Department of Labor Conference, May 25-26, 1999

As part of the U.S. Secretary of Labor's project, "The Workforce/Workplace of the Future," the U.S. Department of Labor joined with the Task Force to sponsor a symposium on changing employment relations and new institutions of representation emerging in the new economy. The meeting addressed several key questions:

- What new strategies and structures are being developed to better represent today's workforce?
- How is the new social contract developing in selected "best practice" firms?
- How are industrial unions and corporations redefining their roles to meet the challenges of today's economy and workforce?

In addressing these questions, symposium participants discussed: the limits of enterprise-based social contracts; labor market institutions that are developing beyond the enterprise-including community-level strategies and alternative models such as professional organizations and social identity groups; and new union strategies for building capacity and rethinking structures.

This paper, written for the symposium by Daphne Gottlieb Taras of the University of Calgary and Bruce E. Kaufman of Georgia State University, informed the discussion around alternative, nonunion models of worker representation.

Abstract

Nonunion representation is a matter of considerable debate in the United States, with arguments both for and against changing American labor laws to permit employee representation to be practiced overtly by nonunion workers and nonunion companies. The *National Labor Relations Act* (*NLRA*) currently places significant constraints on the structure and operation of employee representation committees in nonunion companies. Critics of the *NLRA* claim that its strictures constrain employee voice and inhibit the ability of American companies to form and operate employee involvement and participation programs in nonunion workplaces—to the detriment of both national competitiveness and cooperative employer-employee relations.

Written for the May 25-26, 1999, "Symposium on Changing Employment Relations and New Forms of Worker Representation"—co-sponsored by the Task Force on Reconstructing America's Labor Market Institutions at MIT and the U.S. Department of Labor—this paper provides a background for discussing the potential of nonunion representation through an account of its history, use in contemporary practice, and policy implications. The first section, the "Introduction," includes a comparison of the treatment of nonunion representation in U.S. and Canadian labor laws. The second section reviews the empirical findings on nonunion representation and summarizes both the key points of agreement and the areas that have sparked controversy in America over the legalization of nonunion representation. The authors find that in the long-run, nonunion representation works best when practiced in the shadow of a viable union organizing threat. The third section demonstrates that many U.S. employers are already practicing forms of nonunion representation that are contrary to the language of the *NLRA*. Finally, the paper's fourth section discusses the authors' recommended policy changes: they believe *NLRA* Section 2(5) should be amended to allow collective action by nonunion employees, but in tandem with changes in other sections of the *NLRA* that bolster the ability of nonunion employees to exit ineffective nonunion plans in favor of unions. Because they found from their research that nonunion systems operate best when they exist in the shadow of a viable union threat, the authors believe it is vital that any softening of the nonunion representation ban be accompanied by changes that increase the ability of workers to join bona fide unions. Moves to make nonunion representation lawful must not jeopardize the nation's already low levels of unionization.

I. Introduction

We have completed a major anthology *Nonunion Employee Representation* (NY: ME Sharpe, 2000), which examines nonunion representation's history, contemporary practice, and policy implications. In this paper we draw upon 32 chapters on all facets of the topic, both within the United States and among other countries, including Canada, Japan, Germany, Australia and the United Kingdom. We review the research findings, and offer our own conclusions about the desirability of changing American labor laws to permit employee representation to be practiced overtly by nonunion workers and by nonunion companies.

We begin with brief descriptions of both the American and Canadian contemporary public policy settings. The American situation is that the *National Labor Relations Act (NLRA)*, through Sections 8(a)(2) and 2(5), places significant constraints on the structure and operation of employee representation committees in nonunion companies. In particular, the law makes it an unfair labor practice for a company to operate a dominated labor organization, where "dominated" means that the labor organization is in some way created, supported, or administered by management. The *Act* defines a "labor organization," in turn, quite broadly to include any kind of employee representation group that deals with the employer over a term or condition of employment. Considerable debate has ensued in recent years whether these strictures in the *NLRA* impede employee collective voice and constrain the operation of legitimate, productivity-enhancing employee involvement programs in nonunion companies. This concern was heightened by the NLRB's 1992 *Electromation, Inc.* decision that the company had violated the *NLRA* when it established five employee action committees to work with management on identifying and resolving sources of employee dissatisfaction with various aspects of pay and working conditions.

Critics of the *NLRA* (and, to a lesser degree, the *Railway Labor Act*) claim that its strictures inhibit the ability of American companies to form and operate employee involvement and participation programs in nonunion workplaces and thereby harm both national competitiveness and cooperative employer-employee relations. For several years running, a coalition of Republican and conservative Democrats in Congress have sought to enact legislation, popularly known as "the *TEAM Act*," which would weaken significantly the *NLRA*'s Section 8(a)(2) restrictions on "dominated" labor organizations. *TEAM Act* legislation was passed by both houses of Congress in 1996, was vetoed by President Clinton, and was reintroduced by its Congressional

supporters. The ongoing debate engendered by this proposed legislation, as well as that precipitated by the hearings and final report of the Clinton-appointed Commission on the Future of Worker-Management Relations (Dunlop Commission), have put the nonunion representation on the front burner of the American labor policy debate.

Proponents of the law claim Sections 2(5) and 8(a)(2) are crucial to protecting employee free choice in matters of union representation by preventing employers from manipulating and coercing workers through "sham" company unions. There also are those who agree that the *NLRA* treatment is problematic, but are gravely concerned that a movement to change the *NLRA* with respect to nonunion representation will merely allow management to lawfully employ new techniques to defeat unions. Another group would consider a change to the *NLRA* only if it was accompanied by more sweeping reform to the *Act* in ways which would facilitate an easier transition to unionization where it is desired by employees.

By contrast, Canadians are not engaged in a similar type of debate, and so we draw upon the Canadian statutory framework for comparative purposes. Canadian legislation, which observers would considered similar in most respects to the *Wagner Act*, diverged in its treatment of nonunion representation. Nonunion plans are legal in Canada provided they are not designed to thwart union organizing. In Table 1 below, we blended a variety of Canadian statutes to demonstrate the Canadian approach. At first glance, it appears that the Canadian treatment is quite similar to the American. In Canada, it also is an unfair labor practice for management to participate in, dominate, or interfere with a union. A union which has been influenced by management cannot be certified as a bona fide bargaining agent, and will not enjoy the protections of any collective bargaining statutes. Where Canada deviates from the *Wagner Act* is in the definition of a labor organization. A labor organization means a union, or at the very least, a collective entity whose purpose includes regulation of relations through collective bargaining. Management must not interfere with a union, but management may deal openly with groups of nonunion employees on any issue of concern, including the terms and conditions of employment. It is not an unfair labor practice to run a nonunion employee representation plan because Canadian labor boards do not have the reach given to the U.S. NLRB through Section 2(5). The critical distinction between Canada and the U.S. rests in the definitions sections of the statutes, and not in any departure from the Section 8(a)(2).

Table 1
Statutory Treatments of Nonunion Representation in the U.S. and Canada

Statute	Definition	Prohibition
***National Labor Relations Act* (*Wagner Act*, 1935)**	Section 2(5). A labor organization is "any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."	Section 8(a)(2). It is an unfair labor practice for an employer "To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."
***Railway Labor Act* (1926)**	Section 1."Representatives" means only persons or entities "designated either by a carrier or group of carriers or by its or their employees to act for it or them."	Section 2(2). Representatives for both management and labor "shall be designated by the respective parties and without interference, influence, or coercion by either party over the designation of representatives of the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." Section 3(4). It shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining.
Canadian Approach (blending 12 statutes: federal, public service, and 10 provincial labor codes) -- [information about each of these codes is found in Appendix 2 in this paper]	Definitions Sections: "Trade union", "Bargaining agent", "Union," "Association of employees," or "labor organization" means an entity that has as one of its purposes the regulation of relations between employers and employees through collective bargaining.	Unfair Labor Practice Sections: It is an unfair labor practice for any employer or employer representative to participate in or interfere with the formation or administration of a trade union, or representation of employees in a trade union. Prohibitions against Certification Sections: Labor boards (or in Quebec, the commissioner-general) shall not certify a trade union if it is employer dominated.

This Canadian-American difference motivated an intensive investigation of nonunion employee representation (NER), including its contemporary features and public policy treatment. We found that there are some elements of NER on which there never will be consensus. These include whether nonunion employee representation plans (NERPs) are substitutes to unions,

complements to unions, or make up a free-standing system of industrial relations occupying a different domain of activities. The impact of NER on union organizing remains speculative. These issues form the molten core of controversy that necessarily ensues when any group of industrial relations scholars and practitioners exchange their views on the desirability of nonunion representation.

There also are three major issues on which agreement virtually leaps off the page, regardless of the perspective of the authors. These include (1) that nonunion representation is not an easy human resource practice: it is costly and creates dynamics that make it difficult to manage. In instances where NERPs do indeed substitute for unions, they may well be more cumbersome and challenging than the vehicle they are meant to displace. (2) Enduring nonunion representation plans always match or exceed employment conditions in unionized firms. Senator Wagner's view that they result in a "nibbling of the meanest man," an inevitable deterioration of an industry's wage contour, has no empirical support. (3) The contemporary American public policy debate is misdirected. The controversy over loosening *Wagner Act* restrictions has erroneously fixated around Section 8(a)(2), which details employer interference with labor organizations as an unfair labor practice. Section 8(a)(2) is not now, and never has been the problem. The opinion that we, and a majority of authors in our book espouse, is that Section 2(5) - the overly broad definition of a labor organization - is the crux of the perplexing American statutory treatment.

The next (second) part of this paper reviews the empirical findings on nonunion representation, and summarizes both the points of agreement and the reasons for the American controversy about legalizing nonunion representation.

Despite the *Wagner Act*'s ban on NERPs via Section 2(5) and Section 8(a)(2), nonunion plans have made significant inroads into the American industrial relations landscape. The third part of this paper demonstrates that a number of American employers -- perhaps about 20% of all nonunion employers, and about 50% of those nonunion employers implementing employee involvement and participation programs, if we were pressed to put a raw figure to our impressions and the available data -- are practicing forms of nonunion representation that are contrary to the express language of the *NLRA*.

The fourth, and final, section of this paper addresses the public policy changes that we recommend in order to allow for collective action by nonunion employees without further jeopardizing the low levels of unionization. It is noteworthy that neither Canada nor Japan banned

nonunion representation. In the fourth section we draw upon the Canadian statutes for a different approach to the "Section 8(a)(2) dilemma" than has been previously proposed by American employer lobby groups (e.g. the *TEAM Act*). Because we have found from our research that nonunion systems operate best when they exist in the shadow of a viable union threat, we believe it is vital that any softening of the nonunion representation ban be accompanied by changes that increase the ability of workers to join bona fide unions.

II. Research Findings About Nonunion Representation

Forms, Functions and Effects

Our authors discovered an enormous variety in the forms and functions of nonunion representation plans. There were well over 40 case studies of varying depth incorporated within our volume. Authors grappled with what in practice often were fine distinctions between participation systems (direct employee involvement) versus representation systems (workers indirectly channeling their concerns through employee delegates who interact with management), between on-line (production-related) and off-line (working and employment conditions) topics, and between formal and informal systems. There were differences in the degree of influence, the range of issues, and the membership of various nonunion plans. Distinctions were made between integrative issues such as productivity and quality control, versus distributive or "bread and butter" issues like wages, benefits, and the handling of grievances. There was general agreement among authors that despite the tremendous popularity of employee involvement (EI) scholarship in the past two decades, there has been remarkably little attention given to the capacity of employees to use the EI vehicles at their disposal for representational purposes. Although it is difficult to discern patterns from the remarkable proliferation of nonunion plans' forms and functions, nevertheless, some findings are quite clear.

1. Penetration rates appear to be 20 percent. One fifth of nonunion employees in both the United States and Canada have formal NERPs at their workplaces (Lipset and Meltz). Just under one fifth of United Kingdom workplaces have consultative nonunion employee representation committees (Gollan, citing the 1990 *Workplace Industrial Relations Survey*, which shows a decline in nonunion plans over the previous decade). Among all the nations discussed in our research volume, only the United States has laws intended to severely proscribe the full range of NERPs. Nevertheless, the fact is clear: the extent of nonunion representation is similar in comparable countries regardless of the prevailing law.

2. Most forms of representation are employer-promulgated. Despite the distinctions in forms and functions of NERPs listed above, virtually all nonunion representation and participation plans are employer-promulgated and supported. The overwhelming number were established by

management, although usually with some employee input.

3. Management retains decision-making authority. NERPs rarely yield permanent or even temporary authority to employees. Any "rights" are almost always delegated by management, which retains the ability to abrogate employee independent authority at any time (Hammer). As the worker representative at Delta put it, "We have power to influence but no authority to make changes" (Cone). In the highly formal, long term Joint Industrial Council plan at Imperial Oil, "The JIC can comment, advise, protest or praise, but it has no direct power to initiate or reverse corporate decisions" (Taras).

4. Union threat fuels nonunion systems. The union threat effect is an important underlying dynamic that should be acknowledged as a source of power which fuels nonunion systems. Despite the frequent complaints by opponents of nonunion representation that these plans confer no power to workers, there are a number of studies which suggest that the union threat effect is an important, though subtle, force. Managers take action to strengthen nonunion systems when they face a viable union organizing threat, thus bestowing privileges to workers. Workers also may exercise a union threat in order to achieve advantages in dealing with management, as Taras found was the case in Canadian NERPs. The union threat effect is a source of employee power, and may be a compelling reason for employers to launch nonunion representation. For example, Lipset and Meltz, and Verma, suggested that the higher the union membership in an industry, the more likely the penetration of nonunion representation plans in that industry. In such situations, we might speculate that the NERPs are more likely to take on representational functions, providing alternatives to unions.

5. NERPs are poorly configured for bargaining. In situations involving distributive issues in which a dispute cannot easily be resolved, NERPs suffer from an inequality of bargaining power that cannot be redressed by any of the characteristics indigenous to nonunion plans. Only a union, or the threat of a union, can break a logjam in favor of worker interests. As Senator Wagner put it in the 1930s, "collective bargaining becomes a sham when the employer sits on both sides of the table..." and a few years later, the Canadian Trades and Labour Congress echoed this view that "we cannot have true collective bargaining between and employer and his shadow." Further, the nature of bargaining is such that workers are socialized to ensure their issues are linked to corporate interests of the firm (which Taras calls "vertical bargaining") rather than clustered and traded-off (as they might be in traditional labor-management "horizontal bargaining").

6. NERPS are well configured for communication and collaboration, particularly in matters involving work processes. The function of giving employees "voice" is a dominant and explicit theme, dating back even to the earliest plans (described by Kaufman, Nelson). However, as Hammer puts it: "If employee involvement programs offer the opportunity for employee voice of a broader scope [than discussing management concerns], it is incidental."

7. *NERPs are nonadversarial*. They adopt decision-making techniques that de-emphasize divisions of interests between workers and managers, opting for collaborative and problem-solving styles. For example, votes are rarely taken, and consensus is a desired outcome. Managers tend to share more information and insight with workers in NERPs than they might in unionized settings.

8. NERPs are part of a "high performance" firm-specific philosophy rather than a corporate welfarist response to employment issues or societal ills. Contemporary NERPs are more than merely the erection by some paternalistic firms of modern industrial manors (the metaphor used in Jacoby's acclaimed 1997 book on welfare capitalism). Some might speculate that the current interest in welfare capitalism may be because of employment insecurities as the welfare state is being cut back. As laudable as this motivation might be, we find little contemporary evidence that firms are taking on a larger societal mission to create a social safety net for their particular workforces. Instead, NERPs seem to be a tactic used by some managers to move to a different strategic human resource management model along "high performance" lines. The rhetoric of NERPs is replete with terms such as worksite voice, win-win solutions, and rational problem solving partnerships between employees and managers to further the goals of the firm. By contrast, there is little discussion of job security, of moral behavior, or of the role of the employer as a private supplier of a welfare safety net relative to the 1920s welfare capital period.

9. NERPs usually are one element within a consistent cluster of progressive human resource practices. NERPs were a signal step in the evolution of management from a commodity model of labor toward a more humane, strategic, and participative model, as Kaufman argues in his research. They form a part of a firm's larger system of personnel/human resource practices. The notion that human resource practices of the past were fragmented and piecemeal is seriously misleading. NER is part of a progressive vision of employee relations embraced both by early welfare capitalist philosophies and by modern high performance workplaces. Firms became

committed to NER because of its value to the development of harmonious relations with workers, and the belief that it has the capacity to deliver tangible benefits to the firm and its workforce (although these benefits appear difficult to quantify). Indeed, even the language of the historic NERPs is remarkably contemporary, dealing with "the essentials of team work" (expressed in 1921) and harmony (see Kaufman 2000). If NERPs' purposes are to expose and resolve grievances, communicate ideas, fine-tune corporate policies to suit employees, and investigate the relationship between productivity and employment conditions (without necessarily bargaining), then NERPs have unique advantages over traditional unions.

10. NERPs likely have the macro-economic effects of raising and stabilizing wage rates. Because firms which operate nonunion plans are aware of the union threat or are paternalistic, they adjust wages to meet or exceed union wage rates and actually aid immeasurably in facilitating a stable wage contour. It is the less progressive, more tenuously viable firms that tend to attempt downward pressure on wages, and in these conditions NERPs do not endure. As Gibb and Knowlton (1956: 585) properly acknowledge, NERPs tend to "suffocate" by "sheer weight to generosity the force of unionism within the company." Upward pressure on wages and benefits was a consistent finding in the historic studies as well as contemporary cases.

Another consistent finding is that NERPs preserved compensation premiums, paying members at or above union rates. On the one hand, this can threaten wage standardization policies pursued by national unions; on the other hand, it advances the interests of workers by setting high nonunion wages which unions can bargain to match. NERPs also bring about improvements to benefits programs, which also seep into industry-wide treatment.

11. NERPs are effective in fine-tuning blunt corporate policies (such as benefits instruments). They are better at implementation than initiation. Some authors applaud the substantial gains made by NERPs in creating more sensitivity to workers, and worker delegates speak of their important "watchdog" function (Chiesa and Rhyason). A more cynical view is provided by union leader, Basken: "Nonunion workers simply fine-tune decisions management has already made. Managers use company unions to answer the question 'How can I make it possible to do what I already intend to do?'"

12. NERP structures rarely encompass more than the workers of a single enterprise. With few exceptions (e.g., Loyal Legion of Loggers and Lumberman described briefly by Kaufman, and attempts by counsel to link plans across an industry outlined in Jacoby), NERPs do not group

together across firms or industries. Neither do they respond to issues which require a macro level to resolve, such as pension portability from firm to firm (Sims).

13. NERPs facilitate direct channels of communication between managers and shop-floor workers. Employee representation can improve the efficiency of information collection, processing and dissemination within a complex organizations with multiple levels of authority (Kaufman and Levine). By skipping various layers which naturally filter and distort information, workers and top decision-makers are able to communicate directly with each other. Verma suggests that interest in NER is partially a function of firm size, with larger firms likely able to reap the benefits NERPs offer of more intimate communication that smaller firms naturally enjoy. Basken describes the "insulation" barrier created by hierarchy, that causes managers to minimize to their superiors the true extent of shop floor discontent.

14. NERPs allow employee input into decision-making. Employee representation can counteract the excessive weight given by top managers to the management perspective, and can be an institutional device to ensure that employee perspectives get adequately factored into management decision-making (Kaufman and Levine).

15. NERPs rarely give employees independent resources. Opponents of NERPs argue that they poorly represent employee interests and, in fact, create a false consciousness in which employees perceive they are powerful when they are merely pawns. In 1921 Paul Douglas wrote that company unions neglect to provide vital resources and budgets that could help employees research issues and strengthen their positions. This remains true of the majority of nonunion plans, but there are exceptions (e.g., Delta AirLines and Royal Canadian Mounted Police). The imbalance of economic and information power raises concerns that employees are at a disadvantage, particularly when they lack sophistication and knowledge (Hammer). This is a serious flaw in plans with labor-management dealing over distributive, "bread and butter" issues.

16. NERP selection processes. In formal representation systems, employee representatives or delegates are usually selected either by election or appointment, and for a limited term averaging two years. Employees usually represent other employees, while managers represent the interests of the company. Meetings usually are chaired by management.

17. Mixed results on outcome variables. Given the breadth of forms and functions of NERPs, it is not surprising that the larger empirical studies produce mixed results. Addison, Schnabel and Wagner found in Germany (where works councils are complements to unions) that

works councils are associated with higher wages, lower profits, and reduced turnover, but they point out a number of methodological issues that beset these findings. They suggest that small firms "may be well advised to avoid works councils" because the benefits in terms of collective voice may be exceeded by the costs to employers. Morishima and Tsuru demonstrate that in Japan, nonunion plans are more of substitutes for unions than complements. Though Japanese NERPs strengthen employee voice (but not to the same extent as do unions), they produce no effects on employee separation rates or reported satisfaction with employers. Gollan cites a number of studies of the UK and Australia that demonstrate positive effects on employee morale and behavior.

18. Limiting the petty tyrannies of the foreman and reducing the ever-present threat of discharge without recourse to appeal were two victories of NERPs. With a burgeoning individual rights employment law regime, in tandem with protections for unionized workers, most large firms today pay far more attention to training foreman and handling industrial justice at the worksite. It remains the case today, despite these improvements, that employee representation gives workers a direct channel of communication to senior managers in order to report heavy-handed or inequitable treatment by supervisors and foreman. Foreman and first line supervisors are not only vulnerable to being reported, but they are also cut out of the communications loop by a system which bypasses them in favor of more direct communication lines between workers and senior managers.

19. Reprisal. Though workers' fear of management retribution is still evident in some of the case studies, the degree to which this was a serious concern was tempered by the manner in which employees made their views known to management, and by management style (Boone). Direct systems forced workers to take risks in voicing their own opinions to managers, or remain silent. The "kill the messenger" effect is a problem for any employee representation, despite managers' attempts to assuage worker fears. Indirect systems of representation lessened the chance of reprisal against employees because messages were channeled through worker representatives whose formal responsibility was to speak on behalf of constituents, (sometimes without attribution when necessary) (Chiesa and Rhyason). But this problem must be put into a context in which a substantial number of American workers are unjustly dismissed for supporting union organizing. Any form of voice, union or nonunion, carries attendant risk.

20. Justice. NER can help firms develop and maintain a sense of fair dealing and

equitable treatment among employees (Kaufman and Levine). Many NERPs offer some mechanisms for worksite justice internal to the enterprise, and allow for the disposition of complaints. However, the vast majority of NERPs do not allow workers the opportunity to seek outside counsel or take their grievances to third-party neutrals from outside the firm (although it must be noted that the field of nonunion employer-promulgated arbitration is growing exponentially).

21. No public policy advocacy role. There is no evidence of any significant public policy advocacy role for employees belonging to NERPs (Sims). While unions are active players on the public policy stage, workers who belong to NERPs are to all intents and purposes, invisible. They are not a political force, and they do not provide any sense of worker identity (as do diversity groups, rights and interest groups, and protest groups).

22. Historic advantages. There are a number of features of nonunion plans that were progressive at one time, but are no longer relevant. Early formal nonunion plans shielded union members from discrimination, an important protection which predated labor statutes. For example, only since the 1930s in the US and since 1944 throughout Canada, was discrimination against union members banned as an unfair labor practice. Because statutes now expressly protect union members from discrimination, this aspect of NER has almost irrelevant.

23. More inclusive. NERPs included workers who were not, for various reasons, attractive targets for A. F. L. craft-based organizing, at a time when industrial unionism had not developed. These workers would have been without any form of collective representation but for the advent of NERPs. There is incontrovertible evidence that some large national unions had an inglorious history of discrimination against blacks and women, while NERPs (e.g. at Standard Oil, at Thompson Products, at Swift, in the Bell System) were more inclusive. Since the rise of the C.I.O. and its broader organizing strategy, this is no longer a salient argument for many workers. On the other hand, it remains true, as Commons noted in 1921, that some employers "may be said to be so far ahead of the game that trade unions cannot reach them. Conditions are better, wages are better, security is better, than the unions can actually deliver to their members." NERPs remain attractive vehicles to some workers who prefer to remain nonunion.

24. Effects on unionization. On the important question of whether NERPs interfere with union organizing prospects over the long term, the record is inconclusive. The Canadian paradox is that nonunion representation coexists with a relatively high level of unionism (34 percent, about

two and one-half times greater than the comparable US figure), while in the US, almost the same level of nonunion representation occurs (much of it, allegedly illegal) as in Canada, with no appreciable modern boost to American union density as a result of banning nonunion representation. The evidence is suggestive however, of the following relationship: Where union representation is high, or a union threat is operating, nonunion representation systems are likely more effective for employees than they would be in the absence of unions. "The toothless dog got molars" is how Imperial Oil workers in Canada described the effects of union organizing on their nonunion system. We suspect that managerial attention to representation issues would diminish when coexisting with a weak union movement. Holding constant a cluster of firms dedicated to high involvement human resource practices irrespective of any union threat, it is the marginal employers who in significant numbers might be persuaded to turn their attention towards employee issues when kept alert by the union.

The Pet Bear Metaphor: "NERPs Are Not Easy to Manage"

By and large, employers are ambivalent about formal nonunion representation: the costs and risks are great, the benefits are small or uncertain, and the management style issues are problematic. To successfully implement any cluster of progressive human resource practices requires commitment and resources, and nonunion plans are particularly challenging even to firms with well developed HRM functions. David Boone, a senior Canadian manager, gives a list of prerequisites to overseeing sophisticated employee representation that a more autocratic manager must justifiably find daunting. The costs borne by the company include continuous vigilance, hypersensitivity to discontent, managing open communications across multiple hierarchical levels, and having to balance the need to raise worker expectations with the desire to retain unilateral decision-making authority. Without the shelter offered by explicit management-rights clauses found in union-management collective agreements, management is in a vulnerable position, having to justify its decisions to an often skeptical workforce. As Boone put it, there is "no veil behind which management can hide." Taras has nicknamed NERPS "pet bears" because they require their "trainer" to keep sweets in his pockets and never turn his back for an instant (Taras and Copping 1996).

Given the complexities of managing nonunion vehicles for collective expression, it is not

surprising that there may be a natural threshold level for this practice. Both Lipset and Meltz, and Gollan note that despite different legal treatments, Canadian and American and British companies have similar levels of formal nonunion representation.

Though widespread, we believe that NER remains a "niche" phenomenon in that it is not a form of employee-management relations likely to spread beyond a number of companies which are committed to collective representation (short of unions). NER has dynamics that make it difficult: continuous negotiations, the management of raised expectations, the tendency to continuously sweeten the pot to keep employees at the nonunion table, the need to careful monitor union settlements in the relevant industry to match or exceed any union gains, and the imperative to select managers who have greater interpersonal sensitivity to steward nonunion representation. As a result, as Nelson concluded, "Like most effective and durable company unions, the Rockefeller Plan had a greater impact on management than on labor." It is no easy substitute for unions, and employers who believe they can use NER for this purpose are seriously deluding themselves.

Further, NERPs may provide the organizational base for union organizing. Once workers have acquired legitimacy and a skill set, there is no impediment to prevent them from exercising their discretion to the detriment of management. Jacoby's chapter describes independent local unions as "far from obsequious." Though often less adversarial than national unions, they could be quite assertive, and stubborn. While some ILUs were quite anti-union – that is, determined to remain independent of the larger unions – they often developed personalities of their own. The commitment to collective representation held. Some even sought out other ILUs to form independent multi-employer federations. Gollan writes that in Australia, "evidence suggests that traditional adversarial industrial relations re-emerged when worker expectations were not met."

NERPs are unionizable: they are tempting organizing targets for national unions. Workers are familiar with collective representation, they have formed leadership structures, they have articulated an agenda for advancing their interests (Taras and Copping 1998). In the 1950s, wrote Jacoby, ten percent of ILUs experienced an organizing raid each year. Reg Basken, former President of the Canadian Energy and Chemical Workers Union, developed effective strategies of wooing and winning NERPs into the union fold, which he describes in some detail. Unions must work with, not around, NERP employee leaders. Unions must court NERPs through gradual affiliations. He argues that the structures of NERPs actually facilitate union organizing, but that a union must have a long-term view on organizing. Eventually, the weaknesses of NERPs will

become apparent to workers, but, he laments, this could take 25 years.

NERPs are a costly strategy: labor costs are equal to, and in some instances higher than, they would have been with a large national union (Jacoby, Taras). NERPS do have power to extract rents from management. The more subject to union raids, organizing, and any form of union presence at all, the greater the power of the NERPs to obtain "entitlements" for their nonunion status. Granted, when strike costs are factored in, the equation might equalize. However, there is no great economic advantage that our volume authors can see to running formal nonunion representation.

Given the difficulties in managing NERPs, it is not surprising that we have not discovered a groundswell of demand ready to overwhelm the American workplace in the event of a loosening of restrictions against nonunion representation. Verma found that Canadian employers do not take advantage of their legal freedom to maneuver to create nonunion systems that are substitutes for unions. Employers are anxious to innovate in matters affecting productivity and quality, the systems Estreicher terms "on-line", but tend to avoid seeking employee input into matters involving the terms and conditions of employment. Further, although Canadian firms are legally unrestricted in their ability to develop employee relations systems that are both participative and representative, they rarely do. These systems are the exception rather than the rule.

In summary, we do not anticipate an opening of floodgates towards nonunion representation. From a management perspective, nonunion plans are cumbersome, costly and time-consuming. Employee involvement programs offering direct participation can achieve the same results for management, and are more flexible. Very few employers are genuinely interested in fostering collective worker identity. Finally, like inviting a pet bear into the house, there is an omnipresent fear that the creature cannot be controlled, although it can be pacified temporarily by feeding it a rich diet.

Why Is Consensus Difficult to Achieve?

Nonunion representation issues bring to the forefront a smouldering tension between industrial relations and human resource management. The paradigms of industrial relations are based on worksite justice, the exercise of power and authority, the existence of a plurality of interests, the negotiation of relationships. The goals of human resource management are

incorporating workers into the enterprise with a minimum of discord and an enhancement of productivity. HRM rhetoric permeates the discussion of nonunion representation by its advocates. Opponents see NERPs as a company-initiated subterfuge to pacify and deceive workers who might otherwise seek union representation. They describe NERPs as "brittle" and unions as "durable." Proponents see plans as mechanisms to foster genuine labor-management harmony. To them, NERPs are "cooperative" while unions are "adversarial."

According to managers who practice nonunion representation, who initiate, guide, and contribute to NERPs, their ultimate objective is the achievement of a singularity of purpose between workers and managers for the good of the common enterprise. This is the apotheosis of human resource practice, which attempts to use recruitment, selection, training, compensation, and appraisal techniques, among other vehicles, to align workers into the corporation. NERP is a vehicle used by companies to achieve a mutuality of interests. It is a "win-win" scenario. It is the royal jelly of the human resource lexicon, since it involves employees in the larger enterprise, it engages their talents, it demonstrates that management is gracious in its ability to inspire workers and hear them. It is a institutionalized mechanism for management to "walk the talk" when it makes the claim that employees matter.

By contrast, when NERPs are examined through the industrial relations lens, the flaws of NERPs are starkly exposed. Industrial relations scholars assume that the interests of workers and employers are different, although they can be peacefully accommodated through the use of conflict resolution techniques. This pluralistic view of the workplace raises issues of power, of bargaining and confrontation, of the articulation of separate agendas. Qualms surface about the capacity of NERPs to produce "win-win" outcomes. Surely, some issues require traditional bargaining approaches, and NER fails to adequately arm workers with the power and tools necessary to achieve optimal outcomes from their perspective. This is particularly so in the US, where the labor law was drafted to constrain bilateral dealings regarding wages and employment conditions, but even in countries that permit greater worker-manager interaction, workers have few resources and lack access to professionals outside the firm. Whatever satisfaction workers can achieve from NERPs is granted to them by management fiat. If there is genuine attempt at collective bargaining, the NERP is hopelessly flawed.

Four competing perspectives might help clarify the nature of the controversy. They need not be mutually exclusive, and we present them as separable for clarity only. The first picture involves

a continuum. When NERPs is spoken of as a forum for collective action and voice, it becomes tempting to conceptualize the industrial relations landscape as a continuum from no representation whatever, a strict individual rights regime, through the intermediate NERP forms, ultimately ending in strong national unions and full immersion into collective action. Arising from this view is the notion that NERPs can be used as an organizing strategy by unions, particularly where nonunion plans do not satisfy worker desire for influence. The Canadian practice in the energy sector of unions cooperating with NERPs and organizing them with affiliation agreements is an excellent union-organizing model that arises from the continuum position (Basken). Often we examine collective action as though it were a question involving degree or amount, just as we visualize a gas tank from empty to full. Although we occasionally slip into this mode by force of habit, we believe that the continuum model is flawed because it ignores the multi dimensionality of nonunion representation. NERPs are not usually established by management in order to give workers a vehicle for collective expression, and workers do not usually expect them to serve this purpose. To depict them as though this was their function is incorrect.

The second conception is of separate domains. There is a large body of evidence from the many case studies in our book that NERPs are created for reasons other than management's belief in collective rights. NERPs are used to align workers with managerial objectives. According to this view, the *raison d'etre* of NERPs is workforce unity, and the range of issues revolves around firm imperatives such as production, quality, and process improvement. By contrast, unions are motivated by another vision entirely, of representing the interests of workers when they are different than those of the firm. As Nelson points out, "most unions and company unions occupied separate industrial spheres, rarely competing or even addressing the same issues." Any overlap of activities between NERPs and unions is unintentional. Kaufman makes this position most forcefully in his work.

The third vision is one of complementarity. Union and nonunion systems develop interdependencies. Chaykowski's study of the National Joint Council system in Canada (a post-World War II nonunion variant of the British Whitley plan for government employees) is enlightening. Although the natural tendency might be to view the NJC and the public sector unions as competitors, Chaykowski's surprising conclusion was that for a while the two systems coexisted and over time became complementary. This adds credence to the notion that these systems are not directly substitutable, but are situated in separate domains, and interactions

between them help each refine and focus on areas of special competency. Taras (1997) has argued that unions and NER together stabilize the entire petroleum industry. Unions have an easier time policing economic conditions throughout an industry in which nonunion companies match wages. Sometimes it is the nonunion company that sets the pattern of higher wages for the firm, which the union then spreads throughout the industry via collective bargaining. Where NERPs work well, they have spillover benefits onto unionized sites: they introduce a more cooperative approach, raise wage rates, and allow employees greater voice and influence at their worksites. Boone's description of Imperial Oil's NERP shows that companies which run effective nonunion representation forums are not the types of companies that would be easy to unionize anyway, since there are few inducements to unionize. Economic reasons to unionize are eliminated, and often the noneconomic triggers (e.g., unsatisfactory supervision and lack of worksite justice) are minimized. The likelihood of successful union organizing is poor. But the union can use advances in nonunion settings to leverage its power when dealing with unionized firms. And the relationship flows the other way as well, with managers investigating the terms and conditions available to unionized employees in the industry, and unilaterally matching them in order to sustain nonunion representation and high involvement practices.

The fourth perspective is substitution. According to this view, nonunion representation is a union avoidance mechanism, either by intent or effect. Forums are dominated by management. Workers are programmed to avoid unions both for fear of reprisal, however subtle, and by the use of sound management practices that render unions unattractive. There was sound reason for the development of the substitution perspective in the US. In the early 1930s, with the passage of NIRA, companies quickly mobilized an anti-union offensive using NERPs as the principal weapon. Even in Canada, there were many examples of companies using NERPs as shields against union organizing in the 1940s. Given the spectacular rise of NERPs for union avoidance objectives, it was reasonable that American union leaders begged legislators to ban this form of employee representation in the *Wagner Act*. The AFL-CIO has continued this approach, arguing that "the ultimate goal [of NER] is... to stifle legitimate worker voice and to stave off genuine worker organization" (AFL-CIO Press Release 22 Feb. 1995, p. 1; also see Hiatt and Gold). It is too risky for a weakened labor movement to face yet another tactic in the anti-union arsenal. The first threat to unions is that NERPs are so easily subverted to serve a union avoidance function. NERPs deliver captive audiences to management for the purpose of instilling anti-union messages,

they provide sensing forums for management to assess union proneness and take remedial action, and they socialize workers to see the world through management eyes. The second threat to unions operates at more of a macro level. NER neither institutionalizes worker activism within the context of political action and social change nor provides the mechanisms for diffusion from firm to firm. In North America, only unions have these functions. But NERPs give workers a sufficient taste of voice that they become pacified and fail to see themselves as part of a larger social force.

Our final comment on the controversy over NERPs is that while we are in desperate need for empirical studies on the effects of NERPs, this is an area of study fraught with methodological difficulties. Comparing union and NERP achievements is problematic. To some extent, NERPs achieved significant gains because they attained greater penetration within firms at the forefront of progressive management strategies. Though it is indisputable that NERPs historically resulted in more sanitary and safe working conditions, more professionalism among personnel functions, and a greater attention to due process in worksite disputes, as well as relatively high wages and benefits, it should be noted that NERPs were incorporated into the practices of firms that were most proactive in their treatment of employees. It was not the NERP *per se* that delivered advances to employees, but rather, the underlying management attitude. By contrast, unions were not invited into firms, were met with grudging acceptance at best, and had a tough road to hoe when it came to achieving any victories. NERPs and unions might be proxy variables for other measures, such as managerial attitudes towards workers, degree of human resource innovation of the firm, and so on. And to fail to compare NERPs with unions neglects the notion that a high tide raises all ships: that some NERP successes and failures arise from the same economic and political environment that affects unions. When NERPs fail because they claw back wages and benefits, likely unions are suffering from concessionary bargaining demands as well. When NERPs achieve breakthroughs in the wage envelope, unions cannot be far behind.

Two Taken-for-Granted Topics: A Lack of Representation, and Worker Views

There are two additional brief comments we must make before turning our attention to the specific public policy issues arising from our previous discussion. The first is that we tend to compare nonunion representation systems with unions, and in so doing may muddy the waters. We must not overlook the comparison with worksite conditions for workers who have no form of

representation or participation whatever. The second is that apart from our empirical finding that nonunion representation is employer-promulgated, we have had little to say on the very workers whose issues we are disputing. What do workers think?

Nonunion Representation Versus No Representation

The tendency of industrial relations scholars, the natural instinct borne of generations of scholarship and training, is to compare NERPs to unions. We become so preoccupied with the union-nonunion question that often we simply forget to compare NERP to no representation. Do NERPs provide advantages to workers over no representation? NERPs may be on a continuum with, on a separate domain from, or be substitutes or complements to individual bargaining as well as to collective bargaining. However, there is no dispute in our research volume that NERPs provide workers with benefits that exceed what they could accomplish on their own. The positive benefits include improved communications, both bottom-up and top-down, greater access to managerial decision-makers, the venue and means to express voice, opportunities for leadership positions, and some specific skills training. Without NERPs, firms wishing to hear from their workers is move to a new "small group" approach (e.g. focus groups, sensing sessions), together with an arsenal of survey instruments. Fear of reprisal surely is high when individual employees are forced to speak directly to their employers. Managerial prerogatives are strong, the notion of democratic methods of collective action are lost. As imperfect as NERPs can be, they certainly can bring advantages to employees over a strict individual-based employment relationship. Other benefits depend upon the form and function of particular plans. Managers also claim advantages for their firms. Were it not for the question of the relationship between unions and NERPs, we believe there would be little hesitation on the part of the majority of academics and practitioners to endorse NERPs as an improvement over traditional, autocratic and nonparticipative human resource systems.

Workers' Views

But what do workers want? In a multi-wave survey of American private sector workers, Richard Freeman and Joel Rogers asked respondents to choose between two hypothetical employee organizations, "one that management cooperated with in discussing issues, but had no power to make decisions" and "one that had more power, but management opposed." Non-

managerial employees chose the weak organization over the stronger one by a three to one margin. Astonishingly, there were no appreciable differences between unionized and nonunion respondents (Freeman and Rogers 1998, p. 12). When given a choice between joint committees, unions, or laws protecting individual rights, 63 percent favor joint committees, 20 percent prefer unions, and 15 percent choose laws. (Ibid, p. 15). When offered a choice between an organization "jointly" run by employees and management or one run by "employees" alone, eighty-five percent of respondents favor the former option, while only 10 percent opt for the latter (Ibid, p. 16).

Our research volume included statements by workers representatives, who described their participation in remarkably similar terms. Cathy Cone, of Delta, defined her company's nonunion plan as a "means for establishing greater cooperation and integration through improved communication and mutual understanding." Russ Chiesa and Ken Rhyason, of Imperial Oil, wrote that the "key factor in the success of the JIC is trust and cooperation, and that open and honest communication is crucial to achieving these. We also emphasize that the well-being of employees and the company are interdependent and that we all gain from cooperation and collaboration." Similarly, Kevin MacDougall, of the Royal Canadian Mounted Police, stressed that his nonunion plan eschewed aversarialism. It is not difficult to discern that these employee representatives would echo the majority responses in Freeman and Roger's survey.

III. Compliance Analysis: What Are American Firms Doing?

Given the *Wagner Act* ban on formal nonunion employee representation schemes, and the recent spate of NLRB decisions including the famous *Electromation* case, it is instructive to examine the impact of the *NLRA* on managerial practice in America.

Michael LeRoy recently surveyed employer-members of the Labor Policy Association (LPA) and located 131 participation groups throughout the US. Nearly 73 percent were established after the NLRB decided *Electromation*. He found that about half of the employee groups handle subjects (e.g. scheduling of work) that might lead to compliance problems with the *NLRA*. Further, on the dimension of employer domination in the composition of the committees, about half the sample was in potential violation of the NLRA. In fact, the majority of the participation groups were, in one way or another, operating outside the permissible bounds of the law.

We next excerpt a study by Kaufman, Lewin and Fossum of mini-case studies of employee involvement programs currently in operation at eight American companies. These companies come from a variety of lines of business, are located in several areas of the country, and range in size from approximately one hundred employees to over one hundred thousand. They are mostly or completely nonunion and have committed to EI philosophies and programs. Appendix 1 contains the details of the case studies.

The breadth and depth of employee involvement and participation activities undertaken by these eight companies is quite striking. There is a significant gap between what a strict reading of the labor law says is permissible and what several of these companies are doing in their EI programs. Most noteworthy in this regard are Company C (airline transportation) and Company F (missile manufacture). Both companies have employee representational bodies that are in a number of respects closely akin to the 1920s-era employee representation plans. In the former case, the In-Flight Forum and the Personnel Board Council are division-wide or company-wide representational bodies financed by the employer. They have written charters, elected or selected employee delegates, regular meetings with management, and agendas that include issues related to the terms and conditions of employment. In the case of Company F, the People Council spans five plants, has selected employee representatives that meet with management, and considers various

aspects of the terms and conditions of employment. It should be noted that executives at both companies are well aware of the law regarding nonunion employee committees, have consulted labor attorneys on the matter, and have proceeded with their representation plans in the belief they meet all legal requirements of the relevant labor law (the *Railway Labor Act* in the case of Company C and the *NLRA* in the case of Company F). It can fairly be said that these parts of the EI programs at these two companies appear to push against the boundary of what is permissible under the *NLRA*.

Five of the other companies, Company A (detergent manufacture), Company B (auto assembly), and Company D (paper manufacture), Company G (janitorial equipment) and Company H (package delivery) also have employee representational bodies that in some respect raise Section 8(a)(2) compliance issues, but not to the same degree as Companies C and F. In Company A, for example, the Packaging and Work Process groups are composed of employee representatives and selected managers, focus predominantly on production and quality issues but also on employment matters related to scheduling and safety, have authority to deliberate and make decisions, and are company-financed and controlled. In Company B, the joint safety committees appear to be the part of the EI program that comes closest to infringing on Section 8(a)(2), given that the committees are composed of employee representatives and selected management personnel and are empowered to jointly make decisions on safety matters. In Company D, the department and mill core teams appear to most closely infringe on Section 8(a)(2)'s prohibitions, for even though the focus of the groups is on production issues the employee and management representatives on each team must occasionally consider employment subjects, such as work scheduling, job rotation, and safety, in the course of their deliberations. The EI body in Company G that appears most questionable from a legal point of view is the Plant Advisory Board, since it is an elected representative group and confers with management over some issues that are related to terms and conditions of employment. The employee committees at Company H also sometimes deal with management on issues related to terms and conditions of employment, although unlike the PAB at company G these employee committees tend to be one-time, more informally constituted project teams and thus less likely subject to legal challenge.

The only company of the eight that appears to clearly fall within the permissible boundaries established by the *NLRA* is Company E (photocopier service). The work groups are composed of all technicians assigned to that unit and thus are not representational in nature. These

work groups correspond most closely to the small, production-oriented "teams" also known as “on-line” systems (as opposed to “off-line” systems that are more often representational and deal with issues beyond production and quality) and that are focused on in much of the contemporary management literature on high-performance workplaces.

Another indication of the gap between actual practice among these eight companies and what is permissible under the *NLRA* is to compare their EI programs with the practices cited by former NLRB member and *Electromation, Inc.* co-author Dennis Devaney (1994) as legally permissible. Briefly, they are: to avoid structured groups in favor of EI conducted on an individual or unstructured group level; establish task-specific ad hoc groups focused on productivity, efficiency and communication; use irregular groupings of employees, such as at retreats; and use staff meetings to address communications issues, where all staff are present (to avoid representational issues). It is evident that only the EI program at Company E, the photocopier service provider, comes reasonably close to meeting these criteria. The EI programs at the other seven companies would all have to be modified, modestly at Companies A, B, D, G, and H and substantially at Companies C and F.

To gain further insight on the constraining effect of the NLRA on employee involvement programs in nonunion companies, in each interview at these eight companies Kaufman, Lewin and Fossum asked the management executive a series of open-ended questions about his or her opinion regarding the impact of the law on the company's EI activities and whether the company would use more employee representational EI structures if allowed. These matters were also explored in interviews with managers at three other companies who chose not have their EI activities included in the study. They also interviewed four labor attorneys on the management side who are familiar with EI programs and Section 8(a)(2), and two management consultants who specialize in the design and implementation of high-performance workplace systems. Their comments and observations are summarized and synthesized below. Obviously, they are anecdotal, in some cases speculative, and based on a small number of cases, so caution is required in generalizing from them.

They queried the managers regarding the extent to which they think their EI programs are within the legal constraints of the *NLRA* (or *RLA*). Reactions tended to fall into three groups. The first consists of several managers whose EI programs were clearly within the law, or close to it. Their perspective is that while the restrictions imposed by the *NLRA* may be counterproductive

and out-of-date, this is of little practical concern since they do not have, and do not desire to have, the more formal systems of employee representation that might pose a legal problem.

The second response pattern was from managers whose EI programs come closer to the legal boundary established by the *NLRA* but who have taken pains to make sure the programs meet not only the spirit but also the letter of the law, such as those at Company A. Typically, they were more likely to follow the counsel of a management labor attorney in setting up the EI program and to structure it in ways that would pass muster with the NLRB. In this regard, the managers uniformly saw attorneys as a conservative and restraining influence on their initiatives in the EI area.

The commitment of these managers to a strict "better safe than sorry" approach to EI forces them to make certain compromises or changes in the program that are typically viewed as awkward or counterproductive. To avoid a charge of "dealing with" employees in a manner that would violate the *NLRA*, for example, companies resort to several stratagems. They may announce, for example, that all employment-related issues are "off-limits." Doing so, however, is seen by the managers as counterproductive on two counts. First, many aspects of efficiency enhancement and quality improvement inevitably require detailed, in-depth discussions with workers of various employment issues, such as work schedules, cross-functional training programs, and pay-for-knowledge incentive wage systems. Second, many employees see EI programs devoted only to productivity and quality issues as serving management's interests and thus desire as a quid pro quo that issues central to them, such as pay, benefits, and vacation time, also be put on the table for discussion. Paradoxically, say these management executives, Section 8(a)(2) actually works *against* employee interests in this regard since it provides nonunion companies with a convenient excuse to avoid dealing with issues that primarily affect the well-being and livelihoods of workers.

Alternatively, the companies may completely delegate authority to the employee committees so that there is no bilateral interaction between management and labor, such as making the decisions of a peer review panel final and binding. From a management perspective, this approach both satisfies the law and increases the credibility and legitimacy of the decisions made by the employee representational committee, but on the other hand it also makes the committees sometimes unpredictable and opens up the possibility that without upper management review a committee's decisions may substantially change company employment policy (an "unholy

precedent") or contravene employment law. Or, finally, to resolve the "dealing with" problem the companies may limit the employee committee's role to communication and information exchange, reserving to management the process of deliberation and final decision. As an example, one manager said the employee committee investigated the feasibility of alternative shift schedules, developed a list of pros and cons, and then "heaved the information over the wall" to management, who then made the final decision. This approach reportedly satisfied neither management nor the employees, but was viewed as the price that had to be paid to stay within the law.

The third response pattern is to be cognizant of Sections 8(a)(2) and 2(5) but nonetheless make a trade-off in favor of more effective EI programs at the risk of crossing the line and doing something that may be determined to violate the *NLRA*. Thus, the attitude in these companies is to avoid clear violations but otherwise proceed with their EI programs unless told to cease and desist. This attitude is the product of three convictions: that what they are doing is a win-win for the company *and* employees; that the restrictions imposed by Sections 8(a)(2) and 2(5) are out-of-date and counterproductive and, thus, if a legal problem exists, it is much more a negative statement about the law than their EI practices; and that the penalties in the NLRA for violating Section 8(a)(2) are quite small (typically, a “cease and desist” order), as are the chances of being charged with a violation (Rundle 1994, reports that between 1973 and 1993 the NLRB ordered disestablished less than two employee committees per year).

The study authors also interviewed two management consultants who specialize in designing "high-performance" work systems and four management attorneys who specialize in EI programs and Section 8(a)(2) cases. Both groups were unanimous in their opinion that the *Electromation, Inc.* decision initially cast a significant chill on EI programs, but that over approximately the last five years these fears have eased considerably but not completely (also see LeRoy 2000 and LeRoy 1997) .

Two factors contributed to the easing of concern over *Electromation*. One is a growing perception that the law still provides enough "wiggle room" to do EI and remain within the bounds of the law or not far beyond, albeit subject to some of the awkward or counterproductive constraints noted above. The second, and the more important according to the people interviewed, is that companies increasingly realize that the probability of being charged with a Section 8(a)(2) violation is very small. According to the attorneys, usually the only time a nonunion company gets into legal trouble with its EI programs is when a union begins an organizing campaign, discovers

an in-house employee committee, and files a Section 8(a)(2) charge. But most companies view the probability of being a target of a union organizing campaign as quite small. Furthermore, several attorneys ventured the opinion that the NLRB under Chairman Gould deliberately backed away from prosecuting Section 8(a)(2) cases in an attempt to forestall passage of the *TEAM Act*, or other such legislation. And, finally, even if a company is ultimately found guilty of a Section 8(a)(2) unfair labor practice, the typical penalty, as previously noted, is quite modest.

For these reasons, the managers, attorneys and consultants believed that the restrictions contained in the *NLRA* on "company unions" are having a less adverse impact on legitimate EI programs than was initially feared after the 1992 *Electromation* decision. In effect, some companies have found ways, not always welcome or efficient but nonetheless serviceable, to live with the law, while others have chosen to quietly go beyond it, operating what one person described as "stealth" employee involvement committees.

It would, on the other hand, be incorrect to say that *Electromation* is having *no* effect on nonunion EI programs. Both managers and attorneys stressed that despite the small probability of being charged with a Section 8(a)(2) violation and the small penalties assessed if found guilty, most companies want to stay within the boundaries of the law as a matter of business ethics. Furthermore, most companies understandably want to avoid both the large financial costs and public embarrassment associated with litigation before the NLRB and courts. It was also noted that litigation of Section 8(a)(2) cases can drag out for years, should the company appeal an unfair labor practice charge, with significant costs of diverted management attention, organizational turmoil, and employee demoralization. Finally, some managers said they also did not want to provide unions with a pretext for filing an unfair labor practice charge, or for otherwise harassing the company, and thus they deliberately restrict the expansiveness and scope of their EI efforts.

The study authors then asked how the EI practices in nonunion companies would change if unencumbered by legal considerations. The majority of managers, consultants, and attorneys believed that a fairly large number of companies would modestly expand their EI programs in terms of the breadth and depth of activities delegated to employee representation committees. One manager, for example, said if the law allowed he would allow a plant compensation committee to determine, subject to certain policy guidelines established by top management, the size of the quarterly gain-sharing bonus for production employees. Another said she would allow greater interactions and input into final decisions in a joint employee-management team to investigate

employee complaints about the plant's vacation schedule.

While most nonunion companies would probably expand their EI programs "on the margin," a smaller number, it was felt, probably would go further. All the people interviewed were asked whether companies would, if unconstrained by the *NLRA*, implement some equivalent of the formal, company union-like representational structures found in the 1920s-1930s, per the fears of the opponents of the *TEAM Act*. The common response was that most companies would not go this far, for four reasons. One is that these types of formal plant- or company-wide structures are too cumbersome, costly, and time consuming, particularly in today's environment where operational flexibility and decentralization of decision making is increasingly emphasized. Second, many respondents doubted that these company union-like bodies provide much additional benefit, either in improved efficiency and customer service or improved employee morale, over and above what can be attained from smaller scale, more focused EI activities. Third, many companies like to foster an organizational culture that emphasizes individual treatment and respect and thus shy away from formal systems of employee representation, which tend to create a sense of collective identity among employees and a collective approach to problem-solving. Fourth, managers worry that in-house employee committees may become the launching pad for union organization of the company -- the "pet bear" fear.

These negative features notwithstanding, the people interviewed believed that a small minority of firms would nevertheless choose to operate formal, plant- or company-wide employee committees and councils if permitted by the law. Examples cited were the formal employee representation plans at the Polaroid Corporation and Donnelly Corporation, both recently ordered disestablished by the NLRB (Commission on the Future of Worker-Management Relations 1994a; Kaufman 1999). Partly, it was felt, companies such as these adopt formal systems of employee representation due to the overriding importance attached by their founders or top executives to fair dealing with employees or the fostering of a "family" corporate culture. Also important, Kaufman, Lewin and Fossum were told, is that in very large companies, and especially those experiencing organizational stress, a formal system of employee representation can be an effective method to promote improved communication between top executives and shopfloor workers, separated as they often are by many layers of corporate bureaucracy and thousands of miles of travel distance, and to foster a collaborative approach to resolving potentially divisive issues.

A final issue discussed with the people interviewed was the role of employee committees

and councils as a union avoidance device (also see Taras 1998; Summers 1997). All managers interviewed stated a desire to avoid unionization of their facilities and said their human resource programs, including EI activities, were operated with this goal (as well as numerous others) in mind. They did not see anything anti-social or illegal about this, however, as in their view their companies are avoiding unions by promoting win-win employment practices that yield additional productivity and quality for the company and more satisfying, highly compensated jobs for workers. Several noted, in this regard, that their facilities had not experienced a union organizing drive for many years, if ever, and were in general seen in the local community as highly desirable places to work.

A point made by a number of the people interviewed is that there are cheaper and effective ways, at least in the short-run, to avoid unions—such as targeting hiring and firing decisions to weed-out people more likely to favor unions and use of "hardball" attorneys and consultants at the first sign of union activity--than employee representation committees and the other high-involvement practices. They also noted that the companies most at risk of unionization are often also most likely to avoid establishing on-going employee committees and councils, except perhaps as a stop-gap device, because they do not wish to share power with employees nor give them an opportunity to develop a collective sense of grievance or forum for collective action.

In summary, the evidence suggests that the *NLRA* is a potentially significant constraint on what nonunion companies can do legally. The potential constraining effect of the *NLRA* on nonunion EI programs is mitigated, in practice, by the small number of Section 8(a)(2) cases are filed each year, the weak penalties for a Section 8(a)(2) violation, the uncertain legal boundary between legal and illegal practices, and the decision of some companies to move beyond what a strict reading of the law seems to permit with respect to employee committees. The Kaufman, Lewin and Fossum, and LeRoy studies conclude that the initial alarm over the adverse impact of the *Electromation* decision has dissipated to some extent over time as companies have adjusted their EI practices to conform with the law or chosen to practice "business as usual" on the expectation/hope that either their programs will escape legal scrutiny or, if challenged, pass such scrutiny. On the other hand, the evidence accumulated from the interviews with managers, attorneys, and consultants indicates that companies typically do not venture far outside the limits of the law for both ethical and practical reasons and, thus, the *NLRA* is a meaningful impediment for companies that choose to have extensive, advanced EI programs. A number are constrained only

on the margin, but others would implement larger, more formal employee representation committees and councils if permitted and would choose to deal with employees on a wide range of issues related to terms and conditions of employment.

To Canadians in particular, the preceding discussion about American companies operating on the razor's edge of unlawful practice is excessively legalistic and painfully mismatched to the realities of modern employment practices. The head of a federal Canadian task force on labor law reform, Andrew Sims, parodies the US situation, describing American "workers and employers walking around their plants with their attendant lawyers. . . looking much like pirates with parrots perched on their shoulders."

IV. Policy Implications

We believe public policy should promote two goals. The first is to permit companies to implement programs for employee involvement and participation and to allow them considerable discretion with respect to the role and operation of employee representation committees therein. The second goal we subscribe to is that public policy should fully protect the right of employees to join unions and collectively bargain and that employer practices of a coercive or punitive nature that infringe on this right should be prohibited. We hold this position given widespread evidence that some companies engage in exploitative, opportunistic and/or inequitable practices vis a vis treatment of their employees (Friedman, Hurd, Oswald, and Seeber 1994) and that trade unions and collective bargaining are an important and socially beneficial means employees have to rectify these conditions. But without strong legal protections, workers too often are prevented by employer acts of anti-union discrimination from obtaining independent representation.

Thus the challenge for public policy is to provide as much latitude as possible for nonunion companies to use employee representation committees as part of a legitimate cluster of progressive human resources practices, but at the same time prevent companies from using them as illegitimate tools of union avoidance. We recognize that well-run, successful NERPs tend to substantially reduce employee interest in independent representation, and are useful to employers as a union avoidance device, but this practice seems largely benign and even beneficial to the extent the employer provides wages and conditions of work that meet or exceed what a union can deliver. The practices we wish to prevent are the use of "sham" employee committees which employers hastily put in place to short-circuit union organizing drives and that have no greater purpose than short-run union avoidance and protection of the employer's dominant position.

The policy issue is whether to allow nonunion representation, which is a form of clandestine activity by many American employers, to be practiced in the sunlight, as it is in other countries including Canada, Japan, Germany, Great Britain and Australia.

As we have argued elsewhere (Kaufman 1999; Taras 1998), both policy goals of latitude in employee involvement and representational practice and easy exercise of the union option can be accomplished by a two-pronged change in the *NLRA*. The first is to narrow the definition of a labor organization in Section 2(5) so that it only applies to independent employee organizations

established for purposes of collective bargaining. The problem, according to Estreicher, is that the current 2(5) definition of labor organization "applies even when employees are not seeking to organize an independent union, and do not have the slightest interest in doing so." Its "capture basin" must be limited by either changing "dealing with" to mean "bargaining" or some form of purposeful bilateralism, or tampering with the topics permitted (which we personally do not favor because of artificial limits to workers' ability to pursue their own agenda). The Canadian solution is a possibility: a labor organization should mean a union, or at the very least, a collective entity whose purpose includes regulation of relations through collective bargaining. Even the Labor Policy Associate's April 1999 official complaint that American law violates the NAFTA labor accords contains a discussion of solutions which move away from *TEAM'*s obsessive focus on 8(a)(2), towards other solutions including a change in Section 2(5), with specific attention directed to the Canadian solution (LPA 1999). This change effectively exempts from the coverage of the *NLRA* all nonunion employee committees that are company-created and operated for EI purposes.

At the same time, Section 8(a)(2) should remain unchanged so bona fide agencies of collective bargaining remain free of employer interference and domination. Such a provision is essential in order to prevent so-called "rat unions" (which really represent management interests) from being certified as the exclusive bargaining agent for employees, and being protected from raids by legitimate unions. Section 8(a)(2) is a clear, precise, and cogent directive that prohibits an unfair labor practice and allows the Labor Board to exercise its power to prevent the intent of the *NLRA* from being subverted by any overly-zealous companies. It ought not be tampered with in any way.

Appendix 2 provides a detailed examination of both the American treatment of nonunion representation and the different Canadian treatment. Note that without exception, every Canadian jurisdiction has the equivalent to a Section 8(a)(2), which is used to prevent management-dominated unions from achieving labor board certification as sole bargaining agent for employees. Canadian nonunion systems are lawful, not by virtue of tampering with the clear language of Section 8(a)(2), but rather, by defining labor organizations more narrowly than is the case in Section 2(5).

The other prong of the legislative change effort should be to both strengthen the penalties against employers for acts of anti-union discrimination and streamline the representation election

process. Thus, financial penalties for employee discharge and discrimination for union activity should be substantially increased and the NLRB should be given expanded authority to seek immediate injunctive relief to remedy illegal employer acts. Likewise, NLRB administrative procedures should be streamlined in order to expedite the holding of representation elections so that elapsed time from petition to election is reduced from a median of six weeks to, say, four weeks. Finally, a new unfair labor practice provision should be written into the law that declares it illegal for an employer to create or establish any type of employee representation committee or plan once a union has filed for a representation election. All of these revisions parallel in broad outline Canadian law. The key is to ensure that dissatisfied employees in a nonunion system can rapidly and effectively unionize. We realize that there is no appetite for the kind of reform that would move American labor law in whole cloth toward the Canadian system of expedited elections with no employer campaigning (Taras 1997a). But any move to make it easier for employers to have nonunion representation must be matched by changes that increase the union threat. There are sound empirical reasons: nonunion systems work better in the presence of the union threat.

The animating idea behind this proposal is that if employees have a relatively unrestricted, low-cost means to obtain union representation then nonunion companies are effectively constrained to form and operate employee representation committees only in ways that promote mutual gain. Should the programs promote only management's interests, or be operated in a manner that is unfair or otherwise unsatisfactory, employees can readily voice their unhappiness and replace the company's representation plan with an independent union. The existence of a credible union threat effect thus serves as an effective competitive check on the use and purpose of NERPs. This check is then augmented, in our proposal, by an explicit ban on creation of employee committees during an organizing drive—the time "low road" employers are most likely to form an employee committee for illegitimate purposes of union avoidance. At the same time as law provides employees relatively free access to independent representation, our proposal also frees nonunion employers to establish and operate whatever form of employee representation council or committee (if any) they desire and to discuss with these groups as wide or narrow a range of topics as deemed appropriate. Those employers that are interested in long-run, constructive "high-involvement" employment practices are thus given maximum opportunity to use employee representation groups as part of their EI programs.

These revisions to the *NLRA* are superior, we believe, to those in two other recent proposals. The first is the recommendations contained in the *Final Report* of the Commission on the Future of Worker-Management Relations ("Dunlop Commission"). These recommendations include the following (Commission on the Future of Worker-Management Relations, 1994b):

- The broad definition of a "labor organization" in Section 2(5) should be maintained.

- The language of Section 8(a)(2) should also be maintained in order to prevent the re-emergence of management dominated "company unions," but a qualifying statement should be appended that permits nonunion employee representation groups to deal with employers over terms and conditions of employment as long as these discussions are incidental to issues related to productivity and quality.

- The financial penalties for employer unfair labor practices should be strengthened, the time between petition and conduct representation elections should be shortened, and the NLRB should be given greater authority to issue injunctive relief in cases of employer acts of anti-union discrimination.

The second reform proposal is the TEAM Act legislation approved by both houses of Congress in 1996 but vetoed by President Clinton (Maryott 1997). It proposes the following changes in the NLRA:

- The Section 2(5) definition of a labor organization should be maintained.

- Section 8(a)(2) should be modified so that employers and employees can "address matters of mutual interest," including terms and conditions of employment.

- The prohibition of employer domination of labor organizations should be maintained for employee groups that seek certification as exclusive bargaining agents or to enter into collective bargaining.

- The union representation election process, penalties for unfair labor practices, and NLRB administrative procedures should remain unchanged.

Relative to the recommendations advanced in this paper, it is apparent that both the Dunlop Commission proposal and the *TEAM Act* legislation are one-sided and unbalanced with respect to promoting competition and free choice in employee representation. The Dunlop Commission's proposals are one-sided because they strengthen the protections given to workers to obtain independent union representation but then, having established conditions for fair and effective competition between union and nonunion representational forms, fail to go the next step and remove the tight constraints imposed by Sections 2(5) and 8(a)(2) on nonunion employers. The net

effect is to promote union representation while continuing to restrict nonunion representation. The *TEAM* proposal is also one-sided but in the opposite direction. The legislation largely frees nonunion companies to form and operate whatever type of employee representation plan is desired, but it does nothing to strengthen the *NLRA*'s protection of the right to organize. The net effect is to allow employers to establish dominated labor organizations without at the same time creating the conditions (i.e., low cost, relatively unobstructed access to independent representation) necessary to insure that companies operate these groups only for mutual gain. Furthermore, *TEAM* legislation leaves untouched the root cause of the problem with the *NLRA*—the overly expansive definition of a labor organization in Section 2(5).

A labor act which sanctions only unions as the lawful vehicle by which two or more employees can discuss issues of central concern to them, the terms and conditions of their employment defeats the workers' voice and forces a choice between unions or silence. To ban employees from being able to meet and deal with management about matters at the heart of the employment relationship, even those employees who do not wish union representation, is a draconian measure. The paradox is that employees are able to talk only about matters that mean the most to management, productivity, but are forbidden from speaking about the matters that mean the most to employees. We believe that the *NLRA* today is misguided in persisting to legitimize the notion of collective rights only by allowing one institutional form of collective action, unions, to prevail. To forbid employees from enjoying the benefits of collective representation because it might harm unions is to embrace a position that the worse off the law can make the nonunion worksite, the more it can help unions. This position we find unpalatable. Raudabaugh poses the interesting question "does participative management threaten employee free choice or merely make the union's job of selling the benefits of representation more difficult?" If the answer to the former is yes, we must find solutions to preserve free choice. If the answer to the latter is yes, then unions must develop strategies to make themselves more relevant as they compete with alternative forms of representation.

We turn our attention to how consensus on reform might be developed.

The National Academy of Arbitrators, a large association of skilled union-management labor arbitrators who act as third-party neutrals in disputes, in the past decade was confronted with what likely was its most controversial issue. Arbitrators were being asked to take cases in response to the burgeoning growth in employment (nonunion) arbitration. Some nonunion

companies require employees to sign agreements that they will take employment disputes to arbitration, relinquishing their statutory rights to appear before the courts or other adjudicative tribunals. After bitter fighting about whether member arbitrators should be permitted to hear nonunion cases, (and in so doing, "sell out" the organized labor movement which for decades was the mainstay of the profession) the NAA finally struck a committee that produced a document entitled "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems," (known as the Protocol). The Protocol had this to say about arbitrators who participate in nonunion arbitration schemes:

> Members should recognize that in adjudicating a statutory claim they are in some respects acting as substitutes for a court rather than serving as the final step of a grievance procedure under a collective bargaining agreement. Arbitrators in statutory discrimination cases are confronted with an array of proposed procedures of varying degrees of formality. This will present the sometimes challenging question of whether procedures might be so lacking in fundamental due process that an employee claimant could not receive a fair hearing. The purpose of these guidelines is to provide an outline of practical, procedural, and evidentiary questions of application that the arbitrator might encounter in deciding whether to hear these cases and, if so, how they might be resolved...
>
> Arbitrators should be aware that the power to withdraw from a case in the face of policies, rules, or procedures that are manifestly unfair or contrary to fundamental due process carries considerable moral suasion. . .

The Protocol then lists the many considerations that ensure fair and reasonable standards of due process in some detail -- for example, that the parties have adequate rights of representation, that the hearing location is fair, that the compensation arrangement does not lead to bias, that the arbitrator is granted full remedial authority, that the hearing respects and safeguards substantive statutory rights of the parties, and so on. An arbitrator may decline to hear a particular case. Even more extreme, groups of arbitrators may come together to denounce an employer-promulgated system as failing to meet any due process standards (and the most recent example is the NAA's 1999 amicus brief against Hooter's).

Perhaps a comparable step forward in drafting new legislation balancing the removal of restrictions against nonunion plans with increasing union organizing protections is to bring together a committee consisting of members of the NAA, the Federal Mediation and Conciliation Service, the Industrial Relations Research Association, the Human Resources Division of the Academy of Management, members of the labor law bar, National Labor Relations Board, designates of the

AFL-CIO, and senior practitioners within companies most interested in pursuing high involvement systems.

Our proposal combines in broad outline the recommendations of the Dunlop Commission and the provisions of the *TEAM Act* and, in so doing, achieves a compromise solution to reform of the *NLRA* that serves the interests of all parties to the employment relationship. We argue that Section 2(5) should be modified to permit workers to meet and deal with management on matters of direct interest to their employment relationship in tandem with the insertion of appropriate provisions compelling greater speed in election periods, restricting management action during union organizing, and providing strong, rapid and effective remedies against the commission of unfair labor practices.

References

Addison, John T., Claus Schnabel, and Joachim Wagner (2000). "Nonunion Employee Representation in Germany"in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Chiesa, Rod and Ken Rhyason (2000). "Production District Joint Industrial Council at Imperial Oil Ltd.: The Perspective from the Employee's Side" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Basken, Reg (2000). "My Experience with Unionization of Nonunion Employee Representation Plans in Canada" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Boone, David J. (2000). "Operation of the Production District Joint Industrial Council, Imperial Oil" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Commission on the Future of Worker-Management Relations. (1994a). *Fact-finding report*. Washington: U.S. Department of Labor and U.S. Department of Commerce.

_____. (1994b). *Report and recommendations*. Washington: U.S. Department of Labor and U.S. Department of Commerce.

Cone, Cathy (2000). "Delta Personnel Board Council" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Chaykowski, Richard P. (2000). "Advancing Labor-Management Relations Through Consultation: The Role of the National Joint Council of the Public Service of Canada" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Devaney, Dennis (1994) ."Electromation and DuPont: The Next Generation," *Cornell journal of law and public policy* 4:3-24.

Douglas, Paul H. (1921). "Shop Committees: Substitute for, or Supplements to, Trade Unions?" *Journal of Political Economy*, Vol. 29, No. 2: 89-107.

Estreicher, Samuel (2000). "Nonunion Employee Representation: A Legal/Policy Perspective" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Freeman, Richard B. And Joel Rogers. (1998). "What Do Workers Want? Voice, Representation and Power in the American Workplace." In *Employee Representation in the Emerging Workplace: Alternatives/Supplements to Collective Bargaining*. Proceedings of New York University 50th Annual Conference on Labor. Samuel Estreicher, ed. Boston: Kluwer

Law International.

Friedman, Sheldon, Richard Hurd, Rudolph Oswald, and Ronald Seeber, eds (1994). *Restoring the Promise of American Labor Law*, Ithaca: ICR Press.

Gibb, G. S. and E. Knowlton (1956). *History of Standard Oil Company (New Jersey), The Resurgent Years, 1911-1927*. New York: Harper and Row.

Gollan, Paul J. (2000). "Nonunion Forms of Employee Representation in the United Kingdom and Australia" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Hammer, Tove Helland (2000). "Nonunion Representational Forms: An Organizational Behavior Perspective" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Hiatt, Jonathan and Lawrence Gold (2000). "Employer-Employee Committees: A Union Perspective" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Jacoby, Sanford M. (1997). *Modern Manors: Welfare Capitalism Since the New Deal*. Princeton, NJ: Princeton University Press.

_____ (2000). "A Road Not Taken: Independent Local Unions in the United States since 1935" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Kaufman, Bruce E. (2000). "Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Act Years: A Reassessment" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

_____. (1999). "Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment," *Yale Law and Policy Review*, forthcoming.

_____ and David I. Levine (2000). "An Economic Analysis of Employee Representation" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

_____, David Lewin and John Fossum (2000). "Employee Involvement and Participation Programs: The Role of Employee Representation and the Impact of the NLRA" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Labor Policy Associates, Inc. and EFCO Corporation. 1999. "Employee Involvement in the United States in Non-Union Workplaces as the United States National Labor Relations Board Applies, Interprets and Enforces Section 8(a)(2) of the United States National Labor Relations Act," Public *Communication/Submission on Labor Law Matters Arising in the*

United States before the Canadian National Administrative Office under the North American Agreement on Labor Cooperation. April 14, 1999

LeRoy, Michael (2000). "Do Employee Participation Groups Violate Section 8(a)(2) of the National Labor Relations Act? An Empirical Analysis" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

_____. 1997. "'Dealing With' Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the TEAM Act," *Notre Dame Law Review* 72:31-82.

Lipset, Seymour Martin and Noah M. Meltz (2000). "Estimates of Nonunion Employee Representation in the United States and Canada: How Different Are the Two Countries?" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

MacDougall, Kevin (2000). "Nonunion Employee Representation at the Royal Canadian Mounted Police" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Maryott, Michele. 1997. "Participate at Your Peril: the Need for Resolution of the Conflict surrounding Employee Participation Programs by the TEAM Act of 1997," *Pepperdine Law Review* :1291-1326.

Morishima, Motohiro and Tsuyoshi Tsuru (2000). Nonunion Employee Representation in Japan" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

National Academy of Arbitrators. 1998. "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship." *Proceedings of the 48th Annual Meeting of the National Academy of Arbitrators*, edited by Joyce M. Najita, 1995: Washington D.C.: Bureau of National Affairs.

Nelson, Daniel (2000). "The AFL and the Challenge of Company Unionism, 1915-1937" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Raudabaugh, John (2000). "*Electromation*: An Opportunity Lost or Just Postponed?" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Rundle, James (1994). "The Debate Over the Ban on Employer-Dominated Labor Organizations: What is the Evidence?" In *Restoring the Promise of American Labor Law*, Sheldon Friedman, Richard Hurd, Rudolph Oswald, and Ronald Seeber, eds. Ithaca:ILR Press:161-76.

Sims, Andrew (2000). "A Canadian Policy-Maker's Perspective on Nonunion Representation" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Summers, Clyde (1997). "Works Councils in the American System," *Proceedings of the Forty-Ninth Annual Meeting*. Madison: Industrial Relations Research Association, 106-12.

Taras, Daphne Gottlieb. (1998). "Nonunion Representation: Complement or Threat to Unions?, *Proceedings of the Fiftieth Annual Meeting*. Madison: Industrial Relations Research Association, 281-290.

_____ (1997). "Managerial Intentions and Wage Determination in the Canadian petroleum industry," *Industrial Relations*.Volume 36, 2: 178-205.

_____ (1997a), "Collective Bargaining Regulation in Canada and the US: Divergent Cultures, Divergent Outcomes," in Bruce Kaufman, ed., *Government Regulation of the Employment Relationship*, Industrial Relations Research Association.

_____ (2000). "Portrait of Nonunion Employee Representation in Canada: History, Law and Contemporary Plans" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

_____ (2000). "Contemporary Experience with the Rockefeller Plan: Imperial Oil's Joint Industrial Council" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

_____ and Jason Copping (1996). "When Pet Bears Go Wild: Triggering Union Certifications from Joint Industrial Councils." Unpublished paper presented at the Canadian Industrial Relations Conference.

_____ and Jason Copping (1998). "The Transition from Formal Nonunion Representation to Unionization: A Contemporary Case," Industrial and Labor Relations Review, 52, 1: 22-44.

Verma, Anil (2000). "Employee Involvement and Representation in Nonunion Firms: What Canadian Employers Do and Why?" in Bruce E. Kaufman and Daphne Gottlieb Taras, *Nonunion Employee Representation*, ME Sharpe.

Appendix 1

Eight Case Studies from Kaufman, Lewin and Fossum Study

Company A
Unit: Individual Plant
Line of Business: Manufactures Soaps and Detergents
Employment: 270

Structure of EI

*** Self-managed work teams**. The plant runs on two twelve hour shifts, and each shift has two production teams, one in the process (manufacturing) area and the other in the packaging area. Duties of supervisors covering five functional areas have been delegated to the production teams: safety, production, training, administrative, and counseling. Various team members ("technicians") assume responsibility for managing each of these functions as a "second hat." This requires extensive, on-going, cross-functional training, roughly estimated to be five-ten times the amount provided in a traditional plant. The most important of these areas is production coordinator and this job is elevated to a full-time position. The production coordinator is a team member selected by his/her peers on an annual basis. Teams are responsible for all aspects of day-to-day operation, including ordering supplies, planning production runs, monitoring quality, machine repair, and counseling peers on performance or behavior problems. They also interview new job candidates. When additional technical or management expertise is needed, teams call on "resources" from a cadre of nine people in a "leadership group," such as the plant manager (who splits his time between this plant and another in a different state), the human resource director, controller, etc. The least integrated and self-managed of the groups is the twenty-person administrative support group, composed of clerical and administrative staff.

*** Packaging and Process Work Groups**. The next level of EI in terms of organizational structure is the Packaging Work Group and Process Work Group. Each group meets once a week and has twelve technicians and leaders. The group's mission is to review operating results; address problems or needs in production, quality, training, etc.; perform medium-long range planning for their area; appoint special task forces to work on some issue or problem (e.g., shift rotation, late delivery of supplies), and so on. Technicians rotate on and off each group as part of the way they fulfill the "leadership" block in the pay-for-knowledge compensation system. All technicians thus have an incentive and expectation to develop leadership/management skills.

*** Plant Review Board**. Problems or disputes related to job performance, interpersonal relations, work assignment, etc. are first dealt with at the team level by the employee and one of the several counselors. If not resolved at this level, the HR director is called in as a "resource," and as a final step the grievant can ask that the dispute be presented to a body known as the Plant Review Board, a peer review group composed of both technicians and leaders. The Board can only make a recommendation, the plant manager has final say-so. No employee can be discharged without the Plant Review Board first examining the case.

*** Special Project Teams/Committees**. Ad hoc committees and teams of technicians and leaders are formed on an "as needed" basis to address a particular problem or issue. They develop recommendations that are forwarded on to the leadership group who then make the decision. The company would prefer to have greater joint decision-making at this step, but has built a "wall" in the process to avoid a potential unfair labor practice charge of "dealing with" employees.

*** Compensation**. The plant has a pay-for-knowledge system and an all-salaried workforce. A form of gain-sharing was recently introduced for all employees. Pay rates are pegged at the 95th percentile in the local labor market in order to attract and retain the cream of the local labor supply.

*** Information**. Extensive information on all aspects of production, quality, cost, on-time-deliver, etc. are provided to the technicians. "Nothing is hidden." Formal employee surveys are done, but relatively infrequently and largely in response to a perceived "need to know."

Company B
Unit: Individual Plant
Line of Business: Automobile Assembly
Employment: 2,400

Structure of EI

*** Work Zone Teams**. The plant is organized into "work zones" and each work zone typically has a "team" of 10-20 employees, but these teams are not self-managed (an "area manager" oversees each team in a supervisory capacity). The teams meet at the start of each shift to review production issues, determine job rotation, etc. They are also responsible for quality inspection, repairs, etc. in their work zone. They do not interview job candidates or get involved in peer counseling.

*** IMPACT Groups**. These evolved out of Quality Circles, which proved to be ineffective. An employee may request to the Area Manager that an IMPACT group be formed to solve a problem or address an issue (e.g., a redesign of a work process to reduce heavy lifting). The Manager forms a team of people with the relevant skills/knowledge (e.g., a safety engineer, an HR person) who develop a proposed solution. The Area Manager has the discretion to approve or disapprove the proposed solution, but usually approval is given (sometimes subject to modification).

*** Safety Committees**. These are joint employee-management committees that meet periodically, investigate reports of unsafe conditions, sponsor training sessions, and consider new safety practices and policies. The safety committees are the most formal type of employee representation in the plant. They necessarily deal with subjects related to terms and conditions of employment, such as job rotation, work hours, and line speed.

*** Peer Review Panel**. This is the most "empowered" committee in which employees participate. Employees who have reached the last step of the dispute resolution process, or who have been terminated for certain offenses, can request a hearing before a peer review panel. The panel is composed of five people, two from management and three from the employees. Employees are drawn from a pool who have received additional training in dispute resolution. Their decision is binding and results in reversal of a disciplinary decision in about 20 percent of the cases (a number that is relatively low, it is said, because the process is so carefully managed before cases get to this point).

*** Focus Groups**. Management regularly convenes focus groups of employees to solicit opinions and suggestions on certain topics (e.g., change in vacation scheduling). Thirty to forty employees are selected from across the plant on a one-time basis and meet for an hour or so.

*** Breakfast and Lunch Meetings**. The plant's vice president of human resources, as well as other executives, schedule regular breakfast and lunch meetings with employees for purposes of informal discussion and "taking the pulse."

*** Success Sharing Compensation**. Part of the compensation system is a "success sharing" bonus which makes pay-outs to employees based on plant-level performance on several business plan objectives (e.g., defect rates).

*** Information Sharing**. Periodic employee surveys are done. Video monitors are stationed in each work zone and are used for communicating with employees about new policies, upcoming events, etc. Weekly bulletins and monthly newsletters are also distributed.

Company C
Unit: Company.
Line of Business: Airline transportation.
Employment: 68,000.

Structure of EI

*** Continuous Improvement Teams**. Approximately 3,500 employees from across the company are organized into three hundred continuous improvement teams (CIT). The teams are initiated by the management or employees of an individual work unit (e.g., a group of mechanics at a repair facility), usually include 6-10 people, and focus on work process improvements. Team members volunteer and rotate on and off on an informal basis.

*** Personnel Meetings**. Once every 1-2 years employees in each work unit participate in a "personnel meeting." The divisional vice president, or similar person, leads the meeting, accompanied by a representative of the personnel department. It is essentially a "town hall" event in which the executive first provides an overview of recent business developments, performance issues in the division/work unit, etc., and then solicits questions and discussion from the audience on any and all issues. Suggestions/complaints are recorded for later management review and action.

*** InFlight Forum**. One of the divisions of the company is "Inflight Service." It has 18,000 employees, most of whom are flight attendants. The Senior Vice President in charge of the division organized an employee representational group called the "Inflight Forum" composed of one representative from each of the company's 26 bases. Each representative is elected. The Forum, which meets 3-4 times a year at the company's headquarters, promotes improved communication and exchange of ideas between employees and senior management. Each base has its own "mini-forum" with elected employee representatives who meet with base management. Issues are solicited from all the bases and the two that are both system-wide in nature and of highest priority are put on the agenda of the Forum. Any subject can be discussed, but guidelines established by management stipulate that certain things are "off the table"--mainly subjects that are of a company-wide nature, such as number of vacation days. Besides promoting dialogue, the Forum can form teams to investigate a particular topic, benchmark competitors' practices, and then develop a proposal to be presented to senior management. Management may accept or reject the proposal, or suggest the need for modifications or further deliberation by the Forum.

*** Personnel Board Council**. Approximately two years ago a company-wide body called the "Personnel Board Council" was established. In the last contract negotiations the company's pilots, who are unionized, successfully negotiated to get one non-voting seat on the company's Board of Directors. The company decided also to provide the non-represented employees with non-voting board seats. Toward that end, a representational group was formed, called the Personnel Board Council (PBC), which is comprised of one person from each of seven divisions. One division covers management employees up to the senior executive level. The purpose of the PBC, as stated in a written charter, is to provide a two-way communication channel between the Board of Directors and the employees. The employees in each division establish the procedure for choosing their representative. None is elected; rather, the representatives are chosen through a process of nomination and personal interview conducted by employee peers. The PBC members serve for two-year terms. They solicit opinions, ideas, and complaints from fellow division employees, and also travel as a group to various company facilities to conduct focus groups and personal interviews with employees. They then decide among themselves which is the most important company-wide issue and are given fifteen minutes at the next Board of Director's meeting to

discuss it and present recommendations and proposals. Management does not participate in choosing the topics to be presented to the Board or in developing the proposals, other than to provide information or resources if requested. A summary of the topics presented and the discussion thereof at the Board meeting is distributed to employees through several methods, such as newsletters and electronic intranet system.

*** Profit-sharing**. The company recently established a profit-sharing program for all employees. No other form of gain-sharing or incentive pay is provided.

*** Information Sharing**. Periodic employee surveys are conducted. The results of the most recent one were made available to all employees. A once-a-month "phone-in" is held in which employees anywhere in the world can call in and ask a question of a designated senior executive.

Company D
Unit: Mill
Line of Business: Paper Manufacture
Employment: 700

Structure of EI

*** Production teams**. Production employees are organized into teams built around distinct work processes (e.g., operation of a paper machine). The teams are responsible for day-to-day management of operations and administrative tasks (e.g., safety). Team members rotate jobs, so extensive cross-functional training is done. Each employee has a matrix of required and elective "skill blocks" to complete as part of the skill based pay system. Successful completion of each skill block is determined by a panel of employee peers.

*** Dispute Resolution**. The first step in dispute resolution is counseling with peer team members. If the problem is not satisfactorily resolved, the grievant can ask that a peer review panel be established. The panel's charge is to develop 2-3 possible courses of action, state as a recommendation which one the panel favors, and turn these over to the plant manager who makes the decision. A discharged employee can also request arbitration if the person's team members disagree with the decision.

*** Department and Mill Core Teams**. Every department has a "core team" composed of employee representatives and department management representatives that meets periodically to discuss department level issues. These are generally related to production, quality, on-time delivery, and other such matters, but employment issues such as relief time and safety come up. There is also a "mill core team," composed of 10 employees and six "leaders" (management) that meets regularly to discuss mill-wide issues. Both department and mill core teams have written charters. These charters explicitly state that the teams are not to consider personnel issues, such as wages, vacations, hours, etc. The person interviewed felt this requirement "chilled" the effectiveness of the EI process. The mill core team meetings tend to be bland and the mill manager usually does not attend since employees tend to instinctively defer to his authority. The employee representatives on the mill core team select the employees to serve on the department core team, making it a "feeder" system for the former. Service on these teams is required for successful completion of certain skill blocks.

*** Listening Groups and Project Teams**. Once a year the mill's human resource director forms a "listening group" of employees and solicits their opinion on a set of issues. The mill also puts employees on special project teams to investigate specific issues and make recommendations.

Each year, for example, several employees and the human resource director serve on a compensation committee that surveys pay rates at other mills. The HR director then develops recommendations for senior mill management.

*** Employee Surveys**. Employee surveys are done every two years.

Company E

Unit: State-level unit of the Service Division of an 110,000 employee company.
Line of Business: Service and repair of photocopiers.
Employees: 450.

Structure of EI

*** Organization**. The employees in this unit of the company are primarily service technicians who repair and service the company's brand of photocopiers. Up to the late 1980s, a manager would be assigned to coordinate and monitor approximately twelve technicians. It was the manager's job to act as a clearinghouse for customer calls, assign calls to individual technicians, take customer complaints, and monitor the work and performance of each technician. Technicians provided the manager with daily and weekly reports of their activities, the types of repairs done at each cite, and the cost of parts used. A significant redesign of the traditional organizational structure and underlying work processes was done in the late 1980s as part of a company-wide TQM program. Technicians were formed into work groups (teams) of six to seven members and the group was made responsible for many of the tasks formerly done by the manager (but only after very extensive training). Thus, the work group is empowered to decide how the calls will be handled, who will be assigned to each, and how the work is to be done. Managers now have a span of control of thirty-to-one (approximately five work groups).

*** Information**. Part of what allowed the large increase in span of control is new technology. Each technician has a laptop computer and, instead of giving the manager a written report, downloads the data to corporate headquarters which can, in turn, be immediately accessed by all work group members, the manager, and work groups in other states. Technicians also have electronic access to extensive data on all aspects of the company's business performance. Intra-team coordination has also been facilitated by giving each technician a portable telephone so they are in continual communication with each and can do field-level group brainstorming sessions.

*** Compensation**. Individual performance evaluation now has a large component related to performance of the work group. A gain-sharing program was also installed which makes a part of individual pay depend on the team's performance vis a vis their annual expense budget and surveys of customer satisfaction.

*** Councils, committees , etc**. The work groups are the only formal EI structure in this state unit.

Company F

Unit: Plant
Line of Business: Manufactures missiles.
Employment: 1,000

EI Structure

*** Self-Managed Work Teams**. This plant converted to self-managed work teams over a twelve-month period in the late 1980s as part of a comprehensive transformation to a high-performance, total quality management (TQM)-based work system. Teams range in size up to 20 people, but 8-12 is the preferred size. The teams are given monthly and annual production targets and expense budgets and are responsible for deciding how these are met. Thus, the teams determine the production schedule, the assignment of tasks, extent of job rotation, and perform their own quality inspections. The teams also schedule vacations and can elect to take a temporary "lay-off" if production is slow.

*** Plant-wide Committees**. Three plant-wide joint employee-management committees are in operation. The first is the "workplace action team" which deals with issues such as work schedules and security (a large concern at this facility), the second is the "environment and safety team" which deals with occupational safety and health issues, and the third is the "gain-sharing team" which is responsible for managing the gain-sharing program. Each committee has a "diagonal slice" of employees, including senior plant management, persons from the engineering and administrative staves, and shopfloor employees. The gain-sharing team is the one that elicits the most employee interest and is viewed as being the most prestigious. The gain-sharing program provides employees a bonus payment based on their ability to reduce production costs below a target figure. The committee thus monitors expenses (including management expenses on furniture and travel); periodically adds, deletes, or modifies performance targets; and issues regular reports to the plant employees on the status of that period's gain-sharing pool.

*** People Council**. This plant is one of five in its division. Three councils have been established that cover all five plants: a Production Council, a Growth Council and a People Council (PC). The PC deals with all personnel-related processes and problems, including but not limited to traditional human resource issues. Twelve people serve on the PC, drawn from the five plants and from the ranks of management, the professional staff (engineering), and production employees. The PC meets once a week (via teleconferencing) and is very informally structured and run. Its members have no tenure and are selected by management on a consultative basis with key stakeholders. The People Council charters a variety of project teams that are charged with investigating specific issues (e.g., a new performance management system). These teams are also joint employee-management groups. They periodically update the PC with a progress report and in turn receive "mid-course" feedback. Eventually they present a report or set of recommendations to the PC which through a process of informal consensus-building decides to either accept, modify, or send back the proposal for further work. An accepted proposal is then submitted by the PC to the division's all-management "executive council," which makes the final decision.

*** Town-Hall Meeting**. Every year all employees attend a town-hall meeting off-site where plant management and teams report on various aspects of plant performance, including profit and loss, then followed by an open question and answer period.

*** Peer Review**. A half dozen channels exist for resolution of workplace problems, but one option is to bring the matter before a plant-level peer review panel.

*** Employee Survey**. A survey of employees is done regularly.

Company G

Unit: Plant

Line of Business: Powered Janitorial Maintenance Equipment

Employment: 100

Structure of EI

*** Self-Managed Work Teams**. The plant runs on two 8-hour shifts with six self-managed work teams (SMWTs), varying in size from 2 to 12 people. Each of the teams is responsible for final assembly of a particular product line. Five supervisors (reduced from twelve in the traditional system) perform roles of coaching, mentoring, problem-solving, communicating goals and feedback from higher management, and assisting in disciplinary/performance problems. Teams work with industrial and product engineers to design work areas and assembly procedures as new product prototypes are developed. Each SMWT is responsible for its production planning consistent with output goals of the firm. Teams interview employees or job applicants who are interested in becoming team members and discuss with them team expectations and performance criteria. The teams provide the HR manager with feedback and recommendations but do not have final authority to select among applicants. Teams do have authority to allocate overtime hours among members and were at one time given authority to also allocate vacation days. They did an ineffective job with the latter and this task was transferred back to management.

*** Team Leader Council**. Each SMWT elects a leader who serves on the Team Leader Council. The position rotates among team members. The mission of the Council is to discuss issues that are general across work groups. The Council has fallen into disuse, primarily because of the team-specific nature of many production problems and the temporary nature of the groups' incumbents (due to the rotation in SMWT leaders).

*** Plant Advisory Board.** The Plant Advisory Board (PAB) is an elected group among assembly workers. It meets periodically with top management and receives information about future production plans and wage survey data. The PAB also provides top management with information about employee concerns in these and other areas.

*** CEO Meeting**. The company's chief executive officer (CEO) holds semiannual meetings with all employees to update them on sales, business developments, and other pertinent information.

*** Compensation**. A pay-for-knowledge compensation system was installed when the company adopted self-managed work teams. The company has also had a profit-sharing plan for many years.

Company H

Unit: Company
Line of Business: Express mail and package delivery service
Employment: 121,000

Structure of EI

*** Survey-Feedback-Action Process**. A long-standing human resource practice of this company is its Survey-Feedback-Action (SFA) process. The SFA is a 29-item structured computerized survey that is administered on-line annually to a 10 percent sample of the company's U.S. and Canadian workforce. The human resource department analyzes the responses and distributes a summary report to all managers and supervisors who, in turn, share the report with their employees (the feedback portion of the process), The HR department also uses the response to develop suggested action items for managers and supervisors. Upon mutual agreement that these action items are appropriate, the line managers are required to inform employees of the actions

they plan to take and to monitor their effectiveness. To reinforce use of the SFA, superiors regularly rate the performance of managerial/supervisory personnel in providing SFA feedback to employees.

*** Supervisor-Management Board**. A standing committee, the Supervisor-Management Board (SMB), was established to facilitate communication and exchange of information between senior management and supervisors and lower/middle managers in the various units/departments/facilities. The supervisory members of the SMB are appointed by senior management. The Board considers a wide range of issues but gives particular emphasis to company-level matters. The Board also serves as an "appeals" channel for supervisors and managers—for example, on issues such as promotion, relocation to other company facilities, and proposed areas of action based on SFA reports.

*** Employee Committees**. The company often uses employee committees to deal with specific business and workplace issues. These are generally ad hoc committees of a "project" nature with the members recommended/appointed by management or solicited on a voluntary basis. Many of the issues examined are business related, such as tracking of packages and design of a new Web page, but some employment issues are also considered. Examples include revisions to the company's compensation plan, training and career development programs, job assignments, and an employee recognition and reward program. General managers of units/departments/facilities may establish their own ad hoc committees to deal with business and/or workplace issues, but must receive permission from the Vice –President for Human Resources before doing so. One such "local" ad hoc committee was formed to deal with the issue of relocating company facilities/depots from higher cost to lower cost locations; another was formed to deal with workplace safety issues for employees working the night shift in high-crime areas.

*** Employee Suggestion Program**. A formal suggestion program is in place to encourage employees to submit ideas on how the company can reduce costs, improve quality, and so on. Employee suggestions are made at local facilities and the most promising are forwarded to company headquarters for assessment and action. Over 3,000 suggestions are received annually. Monetary rewards of up to $25,000 re made, along with a variety of non-monetary rewards and recognitions.

*** Guaranteed Fair Treatment Program**. Grievances that can not be settled informally between the employee and first-line supervisor can be appealed through three levels of review: management review, office review, and executive review. This procedure is known and the Guaranteed Fair Treatment (GFT) program and is available to all employees up to the level of middle manager. About five written grievances per 100 employees are filed annually. A maximum of seven days is allowed for settlement at the first two steps and 21 days at the final step.

*** Profit-Sharing**. The company's compensation program calls for 75 percent of an employee's pay to be in the form of a base wage or salary, and 25 percent to be in the form of "pay at risk." The latter component takes the form of profit-sharing. In addition, certain employees receive bonus payments based on achievement of individual, team, or department goals.

*** Information-Sharing**. In addition to information provided to employees through the SFA process, the company uses a printed newsletter and email communications to inform employees about business developments. Also in place is a designated telephone "hot-line" which any employee in the company worldwide can use to pose a question or raise an issue with a senior executive.

Appendix 2

American and Canadian Labor Law Provisions with Regard to Definitions and Prohibitions

U.S. FEDERAL LABOR RELATIONS ACTS

Labor Relations Acts	Definitions	Prohibitions
National Labor Relations Act **(Wagner Act provisions in 1935)**	Section 2(5). A labor organization is "any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."	Section 8(a)(2). It is an unfair labor practice for an employer "To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."
Railway Labor Act of 1926	Section 1. "Representatives" means only persons or entities "designated either by a carrier or group of carriers or by its or their employees to act for it or them."	Section 2(2). Representatives for both management and labor "shall be designated by the respective parties and without interference, influence, or coercion by either party over the designation of representatives of the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." Section 3(4). It shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining.

CANADIAN FEDERAL AND PROVINCIAL ACTS

Labor Relations Acts	Definitions	Prohibitions
***Canada Labour Code Part 1*. [RSC 1985, c. L-2]** Note: This Act covers employees working in federal undertakings, estimated to make up approximately 10% of working Canadians.	Section 3 (1) "Bargaining agent" means (a) a trade union that has been certified by the Board as the bargaining agent for the employees in a bargaining unit and the certification of which has not been revoked. "Bargaining unit" means a unit (1) determined by the Board to be appropriate for collective bargaining or (b) to which a collective agreement applies. "Trade union" means any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees.	Section 25(1) "Notwithstanding anything in this Part [the Labour Relations Code], where the Board is satisfied that a trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired, the Board shall not certify the trade union as the bargaining agent for any unit comprised of employees of the employer and any collective agreement between the trade union and the employer that applies to such employees shall be deemed not to be a collective agreement..." Section 94. No employer or employer representative shall participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union, or contribute financial or other support to a trade union.
***Alberta Labour Relations Code* [RSA, 1988, Ch. L-1.2, as amended 1995]**	Section 1 (b) "Bargaining agent" means a trade union that acts on behalf of employees in collective bargaining or as a party to a collective agreement with an employer or employers' organization, whether or not the bargaining agent is a certified bargaining agent; (x) "Trade union" means an organization of employees that has a written constitution, rules or by-laws and has as one of its objects the regulation of relations between employers and employees.	Section 36(1) Prohibited Practices. "A trade union shall not be certified as a bargaining agent if its administration, management or policy is, in the opinion of the Board, (a) dominated by an employer, or (b) influenced by an employer so that the trade union's fitness to represent employees for the purposes of collective bargaining is impaired." Section 146(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall (a) participate in or interfere with (i) the formation or administration of a trade union, or (ii) the representation of employees by a trade union, or (b) contribute financial or other support to a trade union.

Labor Relations Acts	Definitions	Prohibitions
British Columbia Labour Relations Code **[RSBC 1996, Chapter 244]**	Section 1(l) "Bargaining agent" means (a) a trade union certified by the board as an agent to bargain collectively for an appropriate bargaining unit. Section 1(l) "Trade union" means a local or Provincial organization or association of employees, or a local or Provincial branch of a national or international organization or association of employees in British Columbia, that has as one of its purposes the regulation in British Columbia of relations between employers and employees through collective bargaining, and includes an association or council of trade unions, but not an organization or association of employees that is dominated or influenced by an employer.	Section 6(1) Unfair Labour Practices. "An employer or person acting on behalf of an employer must not participate or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it." Section 31. No employer-dominated association of employees shall be certified as a bargaining agent. An agreement between such an organization or association of employees and an employer shall not be considered as a collective agreement.
Manitoba Labour Relations Code	Section 1: A "union" is an organization of employees formed for purposes which include "the regulation of relations between employers and employees."	Section 6(1). There is a strict prohibition against participation or interference by an employer or employers' organization or person acting on behalf of an employer or employers' organization in the formation or administration of a union or in the representation of employees by their certified bargaining agent. An employer is also prohibited from contributing financial or other support to a union. Section 43. Certification is prohibited where the Board is satisfied that the administration, management, or policy of a union is dominated by an employer to the extent that its fitness to represent employees is impaired. Any collective agreement entered into by the union and the employer is deemed not to be an agreement for the purposes of the Act.
New Brunswick Industrial Relations Act, **consolidated to June 30, 1997. CSNB, Ch. I-4.**	Section 1(1). A "trade union" includes any organization of employees formed for purposes that include the regulation of relations between employers and employees, has a written constitution and by-laws which define the conditions under which persons may be admitted to membership, and includes a provincial, national or international union, but does not include an employer dominated organization.	Section 3 (1) No employer or employers' organization shall participate in or interfere with the formation, selection, or administration of a trade union or council of trade unions or representation of employees in the union, or contribute financial support to a trade union or council of trade unions. Section 18. The Board shall not certify a trade union if any employer or employers' organization has participated in its formation, selection or administration or has contributed financial or other support to it.

Labor Relations Acts	Definitions	Prohibitions
Newfoundland Labour Relations Act	Section 2(1) A "trade union" or "union" means a local or provincial organization or association of employees, or a local or provincial branch of a national or international association of employees within the province that has as one of its purposes the regulation in the province of relations between employers and employees through collective bargaining but does not include an organization or association of employees or a council of trade unions that is employer influenced or dominated.	Section 23. The participation or interference with the selection, formation, or administration of a trade union by an employer or an employers' organization is forbidden, as are financial contributions or other support. Section 44. If the Board believes the administration, management, or policy of a trade union or council of trade unions is (a) influenced by the employer so that its fitness to represent employees in collective bargaining is impaired, or (b) dominated by an employer - such trade union or council of trade unions is not entitled to certification and any agreement entered into between the parties shall be held not to be a collective agreement for the purposes of the Act.
Nova Scotia Trade Union Act [RSNS ch. 475, amended 1994, c. 35]	A "trade union" or "union" means any organization of employees formed for purposes that include regulating relations between employers and employees which has a constitution and rules or by-laws setting forth its objects and purposes and defining the conditions under which persons may be admitted as members thereof and continued in membership.	Section 53 (1) No employer and no person acting on behalf of an employer shall (a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or (b) contribute financial or other support to a trade union. Section 25(15) Notwithstanding anything contained in this Act, no trade union, the administration or policy of which is, in the opinion of the Board, dominated or influenced by an employer, so that its fitness to represent employees for the purpose of collective bargaining is impaired or which discriminates against any person [on grounds prohibited by Human Rights legislation], shall be certified as the bargaining agent of the employees, nor shall an agreement entered into between that trade union and the employer be deemed to be a collective agreement.

Labor Relations Acts	Definitions	Prohibitions
Ontario Labour Relations Act	Section 1: A "trade union" includes a provincial, national or international organization as well as a certified council of trade unions.	Section 65: An employer is prohibited from participating in or interfering in the formation of, or representation of employees by, a trade union. Section 13. The Board will not certify a union which has been financed or supported by the employer, or which has been organized or administered with the assistance of the employer, and will deny certification to any union which discriminates against any person on grounds prohibited by the Human Rights Code, 1981, or Canadian Charter of Rights and Freedoms.
Prince Edward Island Labour Act	Section 7(1): A "trade union" or "union" means any organization of employees formed for purposes which include the regulation of relations and collective bargaining between employees and employers and includes a council of trade unions which have been vested with appropriate authority by any of its constituent unions to enable it to discharge the responsibilities of a bargaining agent.	Section 10(1)(b) An employer, or employers' organization, or any person acting on their behalf is prohibited from participating in or interfering with the formation or administration of a trade union or contributing financial support to such a trade union. Section 15. The Board shall not certify a trade union if an employer or employers' organization participated in its formation or administration, or contributed financial support to it.
Quebec Labour Code (R.S.Q., c. C-27)	Section 1. An "Association of employees" is defined as a professional syndicate, a union, brotherhood or other group whose object is the promotion of the interests if its members, particularly in the negotiation and application of collective agreements. NOTE: A 1969 amendment aimed at eliminating company unions removed voluntarily "recognized" associations from the Code's protection. Only certified associations may make binding agreements.	Section 12: Employers are prohibited from interfering in any manner in the formation or activities of an association of employees. Section 149: Where this prohibition has been violated, the Labour Court may order its dissolution after giving it an opportunity to be heard. Section 29. If there is an allegation of employer interference in the formation or conduct of an employees association, the labour commissioner-general shall order the certification agent [delegated by the commissioner-general to investigate applications for certification] to suspend the investigation.

Labor Relations Acts	Definitions	Prohibitions
Saskatchewan: *The Trade Union Act* [RSS 1978, Chapter T-17]	Section 2 (e) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act. Section 2 (j) "Labour organization" means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes. Section 2(l) "Trade union" means a labour organization that is not a company dominated organization.	Section 9: "The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent. Section 11(1) "It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer: (b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it... (k) to bargain collectively with a company dominated organization..."
Public Service Staff Relations Act [R.S., c. P-35, s. 1.] Note: This Act covers employee relations in the federal Public Service of Canada	Section 2(1) "Employee organization" means any organization of employees the purposes of which include the regulation of relations between the employer and its employees for the purposes of this Act, and includes, unless the context otherwise requires, a council of employee organizations.	Section 8(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization. Section 40 (1) The Board shall not certify as bargaining agent for a bargaining unit, any employee organization in the formation or administration of which there has been or is, in the opinion of the Board, participation by the employer or any person acting on behalf of the employer of a such a nature as to impair its fitness to represent the interests of employees in the bargaining unit.

Note: Prohibitions on employer domination in the third column are followed in most legislation by provisions which allow for certain exemptions, e.g. conferring with the employer is allowed, as are the provision of such items as transportation, employer contributions to pensions or welfare trust funds, and time off for employees to attend to union matters.

Taras/Kaufman Word List